Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

JAMES R. BALLIET,
Petitioner

versus

WILLIAM HEYDT, JOHN R. STEFANIK,
and CITY OF ALLENTOWN,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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(610) 433-2363

I. SHOULD THIS COURT HEAR THIS CASE ON THE MERITS TO DETERMINE WHETHER THE ADA ALLOWS A PLAINTIFF TO BRING A CASE SOLELY TO RECOVER COMPENSATORY AND PUNITIVE DAMAGES, BECAUSE THE EMPLOYER HAS ALREADY GIVEN THE EMPLOYER REINSTATEMENT AND BACK PAY?

II. SHOULD THIS COURT GRANT CERTIORARI TO DETERMINE WHETHER, CONSISTENT WITH THE AMERICANS WITH DISABILITIES ACT, PLAINTIFF COULD BE TERMINATED FOR THE PURPORTED REASON OF "SOCIOPATHIC PERSONALITY, INABILITY TO RESPECT AUTHORITY, DEPRESSION, RAGE, OCCASIONAL DESIRE TO KILL OTHER PEOPLE" AND THEN HAVE THE EMPLOYER PREVAIL BECAUSE PLAINTIFF WAS NOT "PERCEIVED AS DISABLED" UNDER THE ACT?

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OPINIONS AND ORDERS BELOW

The Order of the United States Court of Appeals for the Third Circuit rendered March 2, 1999 is unrecorded and appears at page1a of the Appendix.

The Order of the United States Court of Appeals for the Third Circuit rendered January 29, 1999 is unrecorded and appears at page 3a of the Appendix.

The Order of the United States District court for the Eastern District of Pennsylvania rendered November 17, 1997 is unrecorded and appears at page 7a of the Appendix.

The Order of the United States District court for the Eastern District of Pennsylvania rendered September 22, 1997 is unrecorded and appears at page 9a of the Appendix.

The Decision of Arbitrator dated September 16, 1997 per Alan A. Symonette, Esquire Arbitrator appears at page 60a of the Appendix.

The Decision of Arbitrator dated May 8, 1998 per Edward O'Connell Arbitrator appears at page 30a of the Appendix.

JURISDICTION

The final Order of the Court of Appeals for the Third Circuit is dated March 2, 1999. This Petition for Writ of Certiorari is filed timely within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. §1254(1) and Rule 10(c) of this Honorable Court. The jurisdiction of the Court of Appeals was based upon 28 U.S.C. §1291.

FEDERAL PROVISIONS INVOLVED

The Americans with Disabilities Act [ADA] 42 U.S.C. §12101 et seq.

> "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

CONCISE STATEMENT OF THE CASE

In August, 1984, James Balliet became a police officer with the City of Allentown. He served ably as a patrolman until April, 1990, at which time "Balliet was placed on inactive status as a result of his psychological disability..." according to then police chief Wayne Stephens, who so stated in a sworn affidavit submitted to a district court in prior litigation, Appendix page 82a. Acting on behalf of the Defendant City of Allentown, Stephens terminated Balliet, due to, inter alia, "sociopathic personality, his inability to respect authority, his depression, his rage, his occasional desire to kill other people," Appendix at page 77a (1992 Arb. Deci. At 11). Petitioner has maintained throughout that, in fact, he suffers from no such mental disability or those specific psychological problems.

A relatively tortured procedural history thereafter can be summarized as follows. Balliet litigated his discharge, premised on the above reasons, pursuant to his Collective Bargaining Agreements, before neutral arbitrators. Each time Balliet prevailed before the arbitrators, and each time he was again suspended by the City of Allentown immediately after prevailing. Balliet then filed a Charge of Discrimination with the EEOC and the Pennsylvania Human Relations Commission, alleging an illegal termination under the Americans with Disabilities Act on the perception of a disability.

The last of these terminations, after having prevailed before a neutral arbitration, was on June 2, 1997, which was again premised on the City of Allentown's perception that Balliet was suffering from the "psychological problems" as articulated above. At this time, another Collective Bargaining appeal of Balliet's termination was pending before another neutral arbitrator.

On May 8, 1998, that Arbitrator concluded that the City failed to meet its burden of proof under the Collective Bargaining Unit of showing that Officer Balliet is permanently unable to perform the essential functions of a police officer.

Appendix page 54a. Defendant's interjected this Arbitration Award into this matter which was before the court of appeals. Defendant claimed that Mr. Balliet's success in obtaining reinstatement and back pay from his successful arbitration rendered Balliet's ADA claim "moot and unnecessary."

On January 29, 1999, the Court of Appeals affirmed the dismissal of Balliet's ADA claim, on the grounds that Balliet failed to produce evidence that his employer perceived him to be disabled, and because a neutral arbitrator had award Balliet full back pay and reinstatement which rendered his ADA claim "moot and unnecessary," Appendix at pages 3a (4-5 of 3d Cir op. of 1/29/99). On March 2, 1999, the court of appeals denied Mr. Balliet's petition for rehearing in banc.

The basis for federal jurisdiction in this case is the Americans with Disabilities Act [ADA], 42 U.S.C. §12101 et seq. and 28 U.S.C. §1331 and §1343, 42 U.S.C. §1983.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

I. SHOULD THIS COURT HEAR THIS CASE ON THE MERITS TO DETERMINE WHETHER THE ADA ALLOWS A PLAINTIFF TO BRING A CASE SOLELY TO RECOVER COMPENSATORY AND PUNITIVE DAMAGES, BECAUSE THE EMPLOYER HAS ALREADY GIVEN THE EMPLOYER REINSTATEMENT AND BACK PAY?

The Court of Appeals, in affirming the dismissal of Petitioner's case below, wrote that Finally, it appears that Balliet, as the result of a grievance arbitration award, has been reinstated with full back pay and benefits to his position as a patrolman with the Allentown Police [.] In other words, the relief sought has been obtained, albeit through an administrative proceeding and not a judicial one there likely making any ADA claim moot and unnecessary.

Such a statement of the law amounts to a judicial overruling of the American with Disabilities Act, inasmuch as the Act provides that a discrimination plaintiff may recover compensatory damages for pain and suffering, as well as punitive damages. See 26 U.S.C. Section 12117(a).

This Court ought to examine this important issue of statutory construction. Specifically, is the Court of Appeals correct that if an employer can evade ADA liability by reinstating an employee, and paying full back pay? Such an interpretation seems to conflict with the text of the statute, and as such, ought to come from the United States Supreme Court. In the alternative, the United States Supreme Court could clearly and briefly find that an ADA employment discrimination plaintiff is entitled to bring an action to recover compensatory and punitive damages, even if he has already received full back-pay and reinstatement pursuant to an administrative proceeding. In either case, the issue warrants review by this Court.

II. SHOULD THIS COURT GRANT CERTIORARI TO DETERMINE WHETHER, CONSISTENT WITH THE *AMERICANS WITH DISABILITIES ACT*, PLAINTIFF COULD BE TERMINATED FOR THE PURPORTED REASON "HAS A 'PSYCHOLOGICAL DISABILITY', IS PSYCHOTIC, SUICIDAL, AND DESIRES TO KILL OTHER PEOPLE" AND THEN HAVE THE EMPLOYER PREVAIL BECAUSE PLAINTIFF WAS NOT "PERCEIVED AS DISABILED" UNDER THE ACT?

A review of the merits of this case will allow this Court to explore the contours of what constitutes a "perception of disability" under the ADA. Specifically, this Court will have the opportunity to address the interpretation of the Regulation providing that a disability is a substantial limitation on a major life activity, such as working. This Regulation has been interpreted by a multitude of lower courts to require an almost impossibly high standard of proof. Such interpretations have resulted in, by one estimate, 94% of all ADA employment cases being dismissed at summary judgment. The particular facts at issue here, specifically the fact that the City attempted to terminate Petitioner because he "had a desire to kill people" is a disability which substantially limits Petitioner in the major life activity of working. A decision on whether a purported reason for termination, e.g., that the employee has psychological problems including a desire to kill people, constitutes a substantial limitation on Petitioner's ability to work, will give the federal trial courts considerable aid in applying the proper burden on proof to ADA employment discrimination plaintiffs, and all fact-intensive an inquiry is demanded to determine what a limitation on "working" is.

A covered "disability" under the ADA is defined as follows:

(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(b) a record of such an impairment; or

(c) being regarded as having such an impairment.

42 U.S.C. §12102(2); 29 C.F.R. 1630.2(g).

Mr. Balliet bases his ADA claim on the third statutory definition of disability in that he suffers from no actual impairment but employer treated him as mentally disabled.

Petitioner's contention that a purported reason for termination of "psychological problems including a desire to kill people" is a perceived disability as a matter of law is worthy of review by this Court. The court of appeals adopted the following findings of the district court:

> "Plaintiff relies entirely upon defendant's own descriptive words concerning his perceived psychological problems to establish that defendants regard him as disabled. Such limited proof of an essential element of plaintiff's ADA claim is insufficient as a matter of law to establish, or even to allege, that defendants regard plaintiff as 'disabled' as that term is defined in the ADA."

Opinion of U.S. District Court for Eastern District of Pennsylvania dated September 22,1997 at page 15/Appendix page 20a. Notably, the trial court did not repeat the words used by the employer, which included "sociopathic personality, his inability to respect authority, his depression, his rage, his occasional desire to kill other people." Petitioner believes that the question of whether such language in a purported reason for termination of a ADA plaintiff is, or is not, sufficient as a matter of law to show perception of disability, is worthy of review by this Court.

Sociolpathology, rage, and homicidal tendencies are broad enough disabilities that an ADA "perceived as disabled" Plaintiff ought not be required to additionally prove that that such traits are inconsistent with his job duties. The ADA clearly does not allow an individual to proceed on an ADA claim on the basis that he is perceived as disabled, merely because his cannot

perform the function of the job at issue in each unique case. See Does I-VI v. District of Columbia, 962 F.Supp. 202 (D.D.C. 1997). Indeed, the City does not provide detailed justification for its termination of Balliet as a police officer because he desires to kill others. The City's consistent position, throughout this eight year controversy, has been that Balliet's psychological problems, as described by them, render him unfit for duty. The irony in this case is that both the trial court and the Court of Appeals determined that Petitioner needed to make a threshold showing that such a perception was tantamount to a perception of disability. Petitioner avers that the question of standard of proof under the ADA could be definitively answered by a review of this case on its merits.

If Officer Balliet had the mental impairments perceived by employer he would be precluded from employment both within his chosen profession and every other employment position imaginable. Petitioner contends that, as a matter of law under the ADA, the psychological characteristic of occasionally wanting to kill other people substantially limits one's ability to work.

Defendants' perception of Balliet's mental condition constituted a "significant restrict[ion] in [Balliet's] ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training skills, and abilities." 29 C.F.R. §1630 2(j) 3(I). The quality of being free from even the occasional desire to kill people is not merely necessary in one's working life, it is necessary to lead any semblance of a normal life. Thus, by admitting that he was being terminated for having this trait, the City implicitly acknowledged that it considered him significantly mentally disabled. impaired thus satisfying the ADA threshold. Deane v. Pocono Medical Center, supra. Unlike a situation where Balliet was conceding that he had this disability, in which case it is exceedingly unlikely that he might be accommodated, Balliet has consistently denied that he has any such disability, and any such homicidal tendencies. Indeed, Balliet has

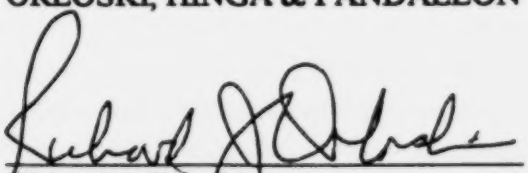
convinced three neutral grievance arbitrators that he ought to be allowed to work as an armed police officer for the City of Allentown. Because Balliet is a "regarded as" Plaintiff, he ought not bear the burden of proving that a disability -- which he denies having – can be accommodated. Clearly, Balliet contends that he is capable of performing the job duties of an Allentown Police Officer without accommodation, because he denies having a disability, and no less than three grievance arbitrators have agreed with him. The narrow issue in this case is whether a "regarded as" plaintiff can proceed to trial when his employer perceives a disabling condition, but which the employee denies having to any extent. Such a case turns the normal formula – the employee attempting to maximize the extent to which he is disabled, and the employer trying to minimize it – on its head. Resolving this important issue of the shifting burden for a "regarded as" ADA employment discrimination plaintiff is a question that ought to be resolved by the highest court in the land.

The actually disabled ADA employment discrimination plaintiff must prove that he is capable of performing his job, or his job with conditions attached to accommodate his disability, in order to prevail. See, e.g., Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 563 (7th Cir. 1996). Balliet, a "regarded as" plaintiff, contends that he can perform his job functions without any sort of accommodation, because his employer is misperceiving him to have a horrible psychological disability. Thus, there can be no question that Balliet is a "qualified individual" pursuant to the ADA. The Supreme Court ought to hear this case to determine whether a "regarded as" ADA plaintiff can prevail when he is perceived to have a disability that is seemingly not subject to accommodation, but where the employee categorically denies any such disability.

CONCLUSION

For the foregoing reasons, Petitioner James R. Balliet asks this Honorable Court to grant his Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit, and review this case on its merits.

Respectfully submitted,
ORLOSKI, HINGA & PANDALEON



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SUPREME COURT OF THE UNITED STATES
October Term, 1998

JAMES R. BALLIET,
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versus

WILLIAM HEYDT, JOHN R. STEFANIK,
and CITY OF ALLENTOWN,
Respondents

APPENDIX OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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FOR THE THIRD CIRCUIT

NO. 97-1959

JAMES R. BALLIET
v.
WILLIAM HEYDT; JOHN R. STEFANIK
CITY OF ALLENTOWN
(D.C. Civil No. 95-cv-05184)

JAMES R. BALLIET
v.
CITY OF ALLENTOWN
(D.C. Civil No. 95-cv-07182

James R. Balliet,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil Nos. 95-cv-05184 and 95-cv-07182)
District Judge: Honorable E. Mac Troutman

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge
SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, MCKEE AND RENDELL, Circuit Judges

The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition for hearing is hereby **DENIED.**

By the Court,

Becker, Chief Judge

DATED: March 2, 1999

UNREPORTED - NOT PRECEDENTIAL
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-1959

JAMES R. BALLIET
v.
WILLIAM HEYDT; JOHN R. STEFANIK; CITY OF ALLENTOWN
(D.C. Civil No. 95-cv-05184)

JAMES R. BALLIET
v.
CITY OF ALLENTOWN
(D.C. Civil No. 95-cv-07182)

James R. Balliet,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C Civil Nos. 95-cv-05184 and 95-cv-07182)
District Judge: Honorable E. Mac Troutman

Submitted Under Third Circuit LAR 34.1(a)
January 11, 1999
BEFORE NYGAARD, ALITO and LEWIS,
Circuit Judges
(Filed: January 22, 1999)

MEMORANDUM OPINION OF THE COURT

NYGAARD, Circuit Judge.

In these consolidated cases, Appellant, James R. Balliet, appeals from two orders of the District Court which granted summary judgment in favor of defendants with respect to his claims in Counts Three, Four and Six, and dismissed under Rule 12(b)(6) all claims in Counts One, Two and Five, and finally, dismissed Counts Seven and Eight under 28 U.S.C. §1367( )(3). He alleges as error the issues listed in paragraph 1, taken verbatim from appellant's brief. Because we conclude that the District Court did not err, we will affirm.

I.

The allegations of error asserted by appellant are as follows:

1. Did the district court err in dismissing Plaintiff's ADA complaint when said dismissal was based upon a Third Circuit decision which was subsequently overruled by an en banc court of Appeals, the district court ignored well-established principles of judicial estoppel, and record evidence established Plaintiff's prima facie ADA claim.

2. Did the district court err in granting summary judgment on Plaintiff's First Amendment retaliation claim where record evidence indicated that Plaintiff was engaged in protected activity and an inference of retaliation and causation was manifest and could readily be made by the finder of fact.

II

The facts and procedural history of this case are well known to the parties and the court, and it is not necessary that we restate them here. Moreover, under the usual circumstances when we affirm by Memorandum Opinion and Judgment, we "briefly set forth the reasons supporting the

court's decision". United States Court of Appeals for the Third Circuit, Internal Operating Procedure (I.O.P.) 5.4. The reasons for writing an opinion are threefold: to instruct the District Court, to educate and inform the attorneys and parties, and to justify our decision. We use a memorandum opinion in cases such as this, in which a published opinion is rendered unnecessary because the opinion has no institutional or precedential value. See I.O.P. 5.2.

With respect to the second issue on appeal, however, we have concluded that neither a full memorandum explanation nor a published opinion is indicated because the opinion filed by the District Court inadequately explains and full supports its order. Hence, we believe it unnecessary to offer further explanations and reasons, in addition to those given by the District Court, why we will affirm Balliet's second allegation of error. It is a sufficient explanation to say that, essentially for the reasons given by the district court in its opinion dated the 22nd day of September, 1997, and appended hereto, we will affirm.

With respect to the first issue on appeal, we note that Mr. Balliet alleges a violation of his rights under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 et seq. He claims that Appellees discriminated against him on the basis of a perceived mental disability. The record, however, fails to demonstrate any support for this claim. In particular Balliet failed to allege or to establish on the record that there is sufficient evidence to support the essential elements of his ADA claim, i.e. that he is a "qualified individual" and that he is "disabled" or, more precisely, that he is regarded as having a "disability". Having failed to either allege or present evidence necessary to meet the essential elements of an ADA claim and having suffered no damages at the time of his claim and having failed to fully pursue his administrative remedy in order to gain the relief sought, the lower court dismissed Balliet's ADA claim.

Balliet argues that inasmuch as the panel decision in Deane v. Pocono Medical Center, No. 96-7174, 1997 WL 500144 (3d Cir. Aug. 25, 1997), was reversed by the en banc court, see Seane v. Pocono Med. Ctr., 142 F.3d 138 (3d Cir. 1998) (en banc), and that this was the decision upon which the District Court relied in dismissing Balliet's ADA claim, he must prevail on appeal. We do not agree. The en banc court's reversal and remand does not involve Balliet's allegation of error raised on appeal. The question addressed by the en banc court in Deane was whether Deane was required to show that she is able to perform all of the functions of her position or just the essential functions of the position, with or without accommodation. The en banc Court's reversal and remand in Deane does not dictate a reversal in this case because Balliet failed to produce any evidence relating to his ability to perform either *all* the functions or solely the *essential* functions of a police officer.

Moreover, the relief sought by Balliet, reinstatement with a reasonable accommodation, is, under Deane, not the type of relief available to a Plaintiff who in fact neither has a disability nor can show that he is perceived to have one.

Finally, it appears that Balliet, as a result of a recent grievance arbitration award, has been reinstated with full back pay and benefits to his position as a patrolman with the Allentown Police Officer. In other words, the relief sought has been obtained albeit through an administrative proceeding and not a judicial one thereby likely making any ADA claim moot and unnecessary.

III.

In sum, for the foregoing reasons, we will affirm the orders of the District Court dated the 22nd day of September and the 13th day of November, 1997.

Nygaard

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-1959

JAMES R. BALLIET
v.
WILLIAM HEYDT; JOHN R. STEFANIK; CITY OF ALLENTOWN
(D.C. Civil No. 95-cv-05184)

JAMES R. BALLIET
v.
CITY OF ALLENTOWN
(D.C. Civil No. 95-cv-07182)

James R. Balliet,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C Civil Nos. 95-cv-05184 and 95-cv-07182)
District Judge: Honorable E. Mac Troutman

Submitted Under Third Circuit LAR 34.1(a)
January 11, 1999
BEFORE NYGAARD, ALITO and LEWIS,
Circuit Judges

(Filed: January 29, 1999)

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on January 11, 1999.

On consideration whereof it is now ordered and adjudged by this court that the judgments of the district court entered on November 17, 1997, is hereby AFFIRMED.

Costs taxed against appellant.

ATTEST:

_____

Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JAMES R. BALLIETT, Plaintiff	:	CIVIL ACTION
	:	NO. 95-5184
vs.	:	
WILLIAM HEYDT, JOHN R. STEFANIK and CITY OF ALLENTOWN, Defendants	:	

–

JAMES R. BALLIET, Plaintiff	:	CIVIL ACTION
	:	NO. 95-7182
vs.	:	
CITY OF ALLENTOWN, Defendant	:	

Troutman, S.J.

ORDER

And now, this 13th day of November, 1997, upon consideration of plaintiff's Motions for Reconsideration, (Doc. #36), and defendants' response thereto, IT IS HEREBY ORDERED that the motion is DENIED.
11-17-97 per E. Mac Troutman, S.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JAMES R. BALLIETT, Plaintiff	:	CIVIL ACTION
	:	NO. 95-7182
vs.	:	
CITY OF ALLENTOWN, Defendant	:	

TROUTMAN, S.J.

ORDER

And now, this 22nd day of September, 1997, upon consideration of defendant's Motions for Summary Judgment, (Doc. ##0 & 0), and plaintiff's response thereto, IT IS HEREBY ORDERED that the motions are DENIED.

IT IS FURTHER ORDERED that plaintiff's Motion for Permanent Injunction, (Doc. #0), and Plaintiff's Motion for Preliminary Injunction, (Doc. #0), are DENIED.

IT IS FURTHER ORDERED that defendant's Motion to Compel Answers to Interrogatories and Request for Production of Documents, (Doc. #0) and plaintiff's Motion for Extension of Time, (Doc. #0) are DISMISSED as moot.

IT IS FURTHER ORDERED that the above-captioned action is DISMISSED for failure to state a claim upon which relief may be granted.

E. Mac Troutman, S.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JAMES R. BALLIETT, Plaintiff	:	CIVIL ACTION
	:	NO. 95-5184
vs.	:	
	:	Filed September 25, 1997
WILLIAM HEYDT, JOHN R. STEFANIK and CITY OF ALLENTOWN, Defendants	:	

JAMES R. BALLIET, Plaintiff	:	CIVIL ACTION
	:	NO. 95-7182
vs.	:	
CITY OF ALLENTOWN, Defendant	:	

Troutman, S.J.

MEMORANDUM

The above-captioned actions are the third and fourth in a series of cases in this Court arising from the Allentown Police Department's continuing, and heretofore unsuccessful, attempts to terminate plaintiff's employment based upon the conclusion of current and former Allentown officials that plaintiff James Balliett is psychologically unfit for duty as a police officer.

In the present actions, plaintiff alleges that defendants discriminated against him on the bases of a perceived mental disability in violation of Americans with Disabilities Act (ADA), 42 U.S.C. §12101, et seq. Plaintiff has also asserted claims under 42 U.S.C. §1983 for violation of first Amendment rights and Fourteenth Amendment rights to due process and equal protection.[1]

Now pending before the Court in both actions are defendants' motions for summary judgment and plaintiff's motions for permanent and preliminary injunction. The circumstances underlying these actions are identical to those upon which the two earlier cases were based. Accordingly, we will begin by repeating the undisputed facts, updating them with events which occurred subsequent to termination of the prior actions. Except as otherwise noted, the statement of facts is drawn from the Court's 1994 memorandum opinion granting summary judgment to defendants in Balliett v. City of Allentown, et al., No. 92-CV-4713, 1994 WL 719637 (E.D. Pa. Dec. 12, 1994); Aff'd., 85 F.3d 611 (3rd Cir. 1996).

---

[1] It is not entirely clear why plaintiff thought it necessary to file two virtually identical complaints, asserting in the first action claims under 42 U.S.C. §1983 and the ADA against the City of Allentown and two individual defendants, and in the second action asserting claims only against the City of Allentown, and only under the ADA. The cases, however, have been consolidated. Thus, for the sake of convenience and simplicity, most references to the pleadings in these cases will be to those filed in the first and more inclusive action, Civil Action No. 95-5184.

I. Factual Background

Plaintiff James Balliett was an officer of the Allentown Police Department from August, 1984, until August, 1990, when he was terminated by the Allentown Chief of Police at the time, Wayne T. Stephens.

In April, 1990, plaintiff had been placed on sick leave by Chief Stephens pending counseling and a psychological evaluation of plaintiff's fitness for duty as a police officer. The ultimate decision to terminate plaintiff's employment was based upon the report of Dr. George M. Perovich, who concluded that, "Mr. Balliett does not want, nor is he suited to be a policeman." (1994 WL 719637 at 2).

Subsequently, counsel for the Fraternal Order of Police (FOP) notified Watson Skinner, president of the Allentown City Council, that he was representing plaintiff and requested that plaintiff be given a hearing before the Allentown City Council pursuant to §4408 of the Third Class City Code, (53 Pa. Cons. Stat. Ann §39408). When Council refused to conduct such a hearing, plaintiff commenced a mandamus action in the Court of Common Pleas of Lehigh County against defendants who were then serving as Allentown police and municipal officials.

Although the court sustained defendants' preliminary objections and dismissed the mandamus action, the court noted that plaintiff would be permitted to file a grievance nunc pro tunc pursuant to the collective bargaining agreement between the City of Allentown and the Fraternal Order of Police, Queen City Lodge No. 10.

Plaintiff did not appeal the dismissal of the mandamus action. He did, however, take advantage of the opportunity afforded him by the state court and asserted his right to a hearing before an arbitrator pursuant to the grievance procedures of the collective bargaining agreement. In December, 1992, plaintiff received a favorable decision on his grievance when the arbitrator ordered plaintiff's reinstatement

to the City of Allentown Police Department. The arbitration award was affirmed by the Lehigh County Court of Common Pleas on March 24, 1994, based upon the court's conclusion that Pennsylvania's Local Agency Law requires a due process hearing prior to termination of a police officer for alleged unfitness for duty. (Exh. C to Defendant City of Allentown's Brief in Support of Motion for Summary Judgment, Doc. #16, 95-CV-7182). The court affirmed the arbitrator's order of reinstatement, but also stated that the City of Allentown could continue to seek plaintiff's termination from the Allentown Police Department. (Id.). The City of Allentown decided not to appeal that order.

Accordingly, plaintiff was reinstated to his position as a police officer on April, 1994, but was immediately suspended with pay pending a hearing before the Police Civil Service Board to determine plaintiff's fitness for service as an Allentown patrolman.

On October 10, 1994, the City of Allentown commenced a hearing before the Police Civil Service Board to determine plaintiff's fitness for duty. (Defendants' Answer to Plaintiff's Complaint, 95-CV-5184, Doc. #9, ¶29). The hearing could not be completed, however, due to a ruling by the Pennsylvania Labor Relations Board that the City is required to negotiate with the FOP over the effect of such a hearing. (Id.)

On August 4, 1995, for reasons not disclosed by the record, plaintiff was ordered to report to the information desk in the Allentown City Hall for an interim light duty assignment pending completion of his termination hearing before the Police Civil Service Board. (See, Exh. C, E, F to Plaintiff's Affidavit in Opposition to Defendants' Motion for Summary Judgment, Doc. #22). Since the FOP took the position that plaintiff's assignment to duties outside of the Police Department was a contract violation, the FOP pursued a grievance under the collective bargaining agreement

between the City of Allentown and the union, which was sustained. (See, Exh. G to Plaintiff's Second Motion for Preliminary Injunction, doc. #27). In accordance with the arbitration award, defendants were ordered to assign plaintiff to a light duty position within the police department. (Id.).

Significantly, however, neither the arbitration award nor the grievance from which it arose challenged or in any way altered defendants' position that plaintiff is psychologically unfit to serve as a police officer. Thus, the arbitrator specifically found that,

> [T]here are positions with the Police Department which do not require the carrying of a gun, the operation of a vehicle, or the following of command instructions in hazardous situations. Indeed, the evidence indicates that officers have been placed in areas involving the processing or maintenance of records which do not involve the handling of firearms nor any contact with civilians.

(Id. at 8). The arbitrator, therefore, specified that plaintiff was to be assigned to a light duty position consistent with the restrictions necessitated by the reasons underlying plaintiff's suspension from full duties as a police officer, i.e., presumably restrictions such as those enumerated above. (Id. at 9). Thus, restrictions on plaintiff's duties as a police officer and defendants' reasons for imposing them were assumed to be valid by the labor arbitrator, at least until resumption of a termination hearing where plaintiff will have the opportunity to challenge defendants' conclusions.

Although there is no supporting evidence in the record, defendants assert, and plaintiff does not dispute, that plaintiff was assigned to a temporary light duty position within the Police Department in compliance with the arbitration award. (See, Brief in Support of Defendants'

Answer to Plaintiff's Second Motion for Preliminary Injunction, Doc. #33, at 5).

By letter dated May 22, 1997, John Monahan, the current Allentown Chief of Police, noting that plaintiff had elected to pursue grievance arbitration under the collective bargaining agreement rather than a civil service hearing, notified plaintiff of the City of Allentown's intent to terminate his employment for non-disciplinary reasons, i.e., due to plaintiff's inability to perform the essential functions of the job as a result of chronic and entrenched personality traits inconsistent with a successful career in law enforcement. (Exh. A to Defendants' Affidavit in Support of Motion for Summary Judgment, Doc. #26). Plaintiff responded thereto, in writing, on May 30, 1997, and the Chief of Police issued his formal termination notice on June 2, 1997. (Doc. #33 at 6). It appears that plaintiff and the City of Allentown are now proceeding with arbitration pursuant to the collective bargaining agreement in lieu of the interrupted hearing before the Police Civil Service Board, but the record does not disclose the present status of that process.

II. Discussion

A. Plaintiff's ADA Claims

Neither plaintiff nor defendants contend that plaintiff is disabled within the meaning of the ADA statute. Rather, plaintiff argues that defendants erroneously "regard" plaintiff as disabled, while defendants argue that they have never believed plaintiff to have a mental impairment covered by the ADA, and, therefore, do not "regard" him as "disabled", as those terms are defined in the ADA. Indeed, defendants' submissions with respect to their motions for summary judgment relate to whether plaintiff can, as a matter of law, establish that his psychological status rises to the level of an impairment within the meaning of the ADA, regardless of defendants' perception of his lack fitness for duty as a police officer. Plaintiff, on the other hand, contends that are

disputed factual issues with respect to whether defendants have characterized plaintiff as disabled, and, therefore, whether plaintiff is entitled to the protections of the ADA.

In light of the recent decision of the Court of appeals in Deane v. Pocono Medical Center, reconsideration granted October 3, 1997 96-7174 - No. 94-1139, slip op. (3rd Cir. Aug. 25, 1997), it is clear that the parties have not entirely set forth or argued all of the issues necessary to resolution of defendants' motion for summary judgment, i.e., whether plaintiff has adequately asserted a cognizable ADA claim, and, if so, whether the relief plaintiff seeks is available, considering the nature of the ADA claim he asserts.

As noted in Deane, plaintiff first needs to establish three essential elements in order to succeed on an ADA claim: (1) that he is a "qualified individual"; (2) that he has a "disability"; and (3) that he suffered an adverse employment action because of his disability. Slip op. At 9. For purposes of surviving defendants' pending motion for summary judgment, however, plaintiff needs to establish either that there is sufficient evidence in the record to support each essential element of his ADA claim or that there are issues of material fact in dispute with respect to one or more of the elements of the prima facie case.

Evaluating in reverse order the legal standards applicable to the elements of plaintiff's claim, it is obvious that he suffered an adverse employment action specifically because of a 1990 psychological report from which Allentown police department officials determined that plaintiff was not fit for duty as a police officer. Although plaintiff contends that the report was and remains erroneous, he also contends that it is the basis for defendants' perception that plaintiff suffers from a mental disability. Moreover, there is evidence in the record that an additional examination of plaintiff was conducted by a different psychologist in 1994, the results of which support the earlier psychological

evaluation and report, and, therefore, caused defendants to continue to seek plaintiff's termination from his employment as a police officer. (See, Defendants' Brief in support of Motion for Summary Judgment, (Doc. #19 in 95-CV-5184), Exh. E, Report of Joanne M. Regina, Ph.D. re: 6/8/94 psychological evaluation of plaintiff.) We conclude, therefore, that since plaintiff suffered an adverse employment action based upon mental status evaluations, he can establish the third element of a prima facie case under the ADA, if such evaluations support the conclusion that plaintiff is disabled within the meaning of the ADA.

We turn next to the question whether plaintiff can establish the disability element of an ADA claim. A "disability" is defined in the ADA as follows:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

Deane, slip op. At 10, quoting, 42 U.S.C. §12102(2); 29 C.F.R. 1630.2(g).

Plaintiff bases his claim on the third statutory definition of disability, maintaining that he suffers from no actual impairment but has been treated by defendants as if he is mentally disabled. Plaintiff appears to argue that he an meet the "regarded as" having a disability standard by pointing to the words used by defendants' to describe their reasons for seeking his termination. Thus, plaintiff notes that defendants have referred to his "psychological problems" and "sociopathic personality" and have specifically relied upon "mental health reasons" to support their attempt to discharge plaintiff. (See, e.g., Plaintiff's Brief in Opposition to

Defendants' Motions for Summary Judgment, Doc. #23 at 10). Plaintiff cannot, however, simply assume that defendants' characterization of his psychological state is sufficient proof that he is "regarded" by defendants as suffering from a "disability".

Rather, plaintiff must establish that the mental impairment which defendants allegedly regard him as having, if it existed, would substantially limit one or more of his major life activities. Plaintiff's underlying position, however, has always been that the psychological evaluations he has undergone at defendants' behest, and the resulting reports upon which defendants rely, are fundamentally flawed. Plaintiff has not, therefore, attempted to demonstrate that the mental health problems he denies having are substantially limiting.

Defendants, on the other hand, argue that although plaintiff's lack of fitness for duty as a police officer and the psychological bases for it are real, plaintiff's mental state does not create an impairment which substantially limits, in general, his ability to work. It is for that reason that defendants assert that they do not "regard" plaintiff as having a mental impairment which substantially limits a major life activity, and, therefore, amounts to a "disability" for purposes of an ADA claim.

There is a strong suggestion in Deane that, notwithstanding plaintiff's likely ability to function well in many work situations, defendants' insistence that plaintiff is not psychologically fit to be a police officer is sufficient to establish that the personality factors cited by defendants in support of that conclusion rise to the level of a disability within the meaning of the ADA. Since plaintiff was trained as a police officer and was engaged in that employment for six years prior to the psychological examination that triggered efforts to discharge him from the Allentown Police Department, it appears that defendants' belief that plaintiff

can no longer perform those duties might significantly restrict plaintiff's ability to perform the very class of jobs in which others with comparable training and experience would be expected to obtain employment.

Nevertheless, plaintiff has neither presented evidence, nor suggested that he is aware of his obligation to adduce evidence, that he is "disabled' within the meaning of the ADA due to defendants' perception of his psychological status, i.e., that the mental condition which defendants indisputably regard plaintiff as having substantially limits his ability to work in a class of jobs for which plaintiff's training and experience have prepared him and in which he could be employed absent the psychological factors which defendants contend render plaintiff unfit for duty as a police officer. We conclude, therefore, that plaintiff has failed to either allege or otherwise demonstrate that he can ultimately establish the "disability" element of his ADA claim. As noted, plaintiff relies entirely upon defendants' own descriptive words concerning his perceived psychological problems to establish that defendants regard him as disabled. Such limited "proof" of an essential element of plaintiff's ADA claim is insufficient as a matter of law to establish, or even to allege, that defendants regard plaintiff as "disabled" as that term is defined in the ADA.

Moreover, plaintiff has neither alleged nor attempted to demonstrate that he is a "qualified individual", which is the third essential element of his ADA claim. As noted in Deane, there are two components to the term "qualified". In the first instance, plaintiff is required to establish that he has "the requisite skill, experience, education and other job-related requirements of the employment position that plaintiff holds or desires." Slip op. At 17. Although plaintiff has not specifically alleged that he is "qualified" for the position of a police officer in those terms, it is clear that he has such qualifications. As noted, plaintiff was trained and worked as

a police officer for a number of years. We conclude, therefore, that plaintiff can establish the first prong of the qualifications standard.

To fully establish that he is "qualified" for the position of police officer, however, plaintiff must also demonstrate that he can perform all of the essential functions of a police officer. Id. In the case of an actual disability, an ADA plaintiff must identify the essential functions of the position and, ultimately, present evidence that he can either perform those functions without accommodation or that reasonable accommodations can be implemented that will enable plaintiff to perform the essential functions of the job he seeks to obtain or retain.

With respect to an ADA claim based upon allegations that plaintiff suffers from no actual disability but is "regarded as" disabled, plaintiff must still identify all of the essential job functions, but is required to produce evidence that he is capable of performing all such duties without accommodation, since, as stated in Deane, "[W]e do not believe that Congress intended that an individual who is only perceived to be disabled would be entitled to accommodation." Slip op. at 22. The court explained its reasoning as follows:

> In the context of an individual who is not actually disabled but is merely "regarded as" such, i.e., one who is not statutorily disabled, that which renders him or her disabled is not the individual's impairment, if impairment there be, but the employer's unfounded stereotypes, fear or simple misperception that the impairment is serious enough to be disabling. To compensate for a statutory disability, then, the employer need only be dispossessed of its misperception, as it is that which renders the employee disabled. Thereafter, the individual would be neither actually nor statutorily disabled and, like

> any non-disabled individual would not be able to invoke the accommodation provisions of the ADA for any non-disabling impairments—including the impairment that initially might have given rise to the employer's perception of a disability.

Id. at 23, 24.

In this action, although plaintiff insists that he does not actually suffer from any psychological disability, he has not alleged, and has made no effort to prove, that he can presently perform the essential functions of the job of a police officer.[2] In addition, the only relief plaintiff seeks is reasonable accommodation for his perceived mental impairment in the form of a permanent light duty position in the Allentown Police Department.[3] Pursuant to Deane, this is not a cognizable

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[2] Plaintiff alleges, generally, that prior to his initial termination for the Allentown Police Department in 1990, he was able to function adequately as a police officer, but such allegations do not provide a basis for concluding, as a matter of law, that seven years later, plaintiff is still capable of performing all of the essential functions of the position.

[3] Plaintiff's claim for relief under the ADA is stated, albeit somewhat confusingly, in ¶¶ 35 & 34 of the complaints in these actions:

> Even assuming, arguendo, that Plaintiff was in some way disabled, there are many "light duty" positions within the Allentown Police Department which can accommodate Plaintiff's perceived disability, and Defendants Heydt, Stefanik and City of Allentown have refused and continue to refuse to accommodate this disability, albeit perceived, which is mandated by the American's with Disabilities Act.

More clearly, plaintiff has stated in ¶¶ 44—47 of his affidavits in opposition to summary judgment that under the ADA, defendants are required to provide him with a "light duty" position within the Allentown Police Department to accommodate his perceived disability" and that he is able and willing to accept and perform such "light duty" position on a permanent basis.

remedy for the type of ADA claim that plaintiff attempts to assert, i.e., that he is entitled to job protection because defendants "regard" him as disabled. Thus, even if plaintiff succeeded in proving that defendants have treated him as if he suffers from a disabling mental impairment within the meaning of the ADA, defendants are not required to provide reasonable accommodation for "regarding" plaintiff as disabled by assigning him to a permanent light duty position as an Allentown Police Officer.

It is apparent that in asserting his ADA claims, plaintiff has fundamentally misperceived both his burden of proof under the ADA in general and the type of relief he is entitled to seek and receive should he succeed in proving that defendants "regard" him as disabled. The ADA allegations in plaintiffs' complaints, his arguments in opposition to summary judgment, the lack of any evidence or proffer of evidence relevant to the essential elements of an ADA claim, and the relief plaintiff seeks all demonstrate that plaintiff has not presently asserted a cognizable ADA claim.

This is not to say, however, plaintiff would never be able to assert a proper claim for appropriate relief under the ADA. Moreover, under Deane, it is by no means certain that defendants can successfully resist a well-pleaded ADA claim by relying only upon the argument that, as a matter of law, plaintiff is not "disabled" within the meaning of the ADA if the mental impairments that they believe plaintiff has do not foreclose his general ability to work. It is conceivable, therefore, that plaintiff could allege and prove that defendants' perceptions of his mental status render him disabled within the meaning of the ADA, that such perceptions are erroneous and that notwithstanding defendants' belief to the contrary, plaintiff is capable of performing the essential functions of a police officer, and, therefore, should be reinstated to full duties in the Allentown Police Department. Indeed, these very issues are,

presumably, the subject of the ongoing arbitration proceeding under the grievance provisions of the collective bargaining agreement between the FOP and the City of Allentown.

Although plaintiff's ADA claims are clearly not cognizable as alleged and as defended in opposition to defendants' motions for summary judgment, there is likewise considerable uncertainty concerning the legal accuracy of defendants' summary judgment position. In addition, in light of plaintiffs' pursuit of a grievance under the collective bargaining agreement to challenge his termination, which appears to implicate essentially the same issues as a proper ADA claim, it is by no means certain that plaintiff will ultimately need to pursue a remedy under the ADA, since he might achieve all the relief that he could receive pursuant to a properly alleged ADA claim if he succeeds in the arbitration proceeding. For these reasons, we conclude that it is not presently appropriate to either grant defendants' motion for summary judgment or to proceed with plaintiff's ADA claims, which would require giving plaintiff the opportunity to amend the complaints in an attempt to state a claim upon which relief can be granted under the ADA. Rather, we will dismiss plaintiff's ADA claims without prejudice to plaintiff's ability to assert a legitimate claim, i.e., one in which the essential elements of a cognizable ADA claim are alleged and which seeks relief appropriate to the nature of the claim asserted, if plaintiff later concludes that such a claim is necessary and available to him in light of developments in the arbitration proceeding under the collective bargaining agreement.[4]

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[4] We do not here intend to suggest or determine that a future ADA claim would be either necessary or appropriate, no matter what the outcome of plaintiff's grievance arbitration. Thus, we are certainly not expressing an opinion, one way or another, with respect to whether a potential ADA claim brought after conclusion of the arbitration under the collective bargaining agreement between the City of Allentown and the FOP could succeed, whether either claim or issue preclusion

Thus, we will deny defendants' motion for summary judgment, but will, nevertheless, dismiss plaintiff's ADA claims for failure to state a claim upon which relief may be granted.

B. Additional Claims

1. Injunctive Relief

Plaintiff's pending motions for permanent and preliminary injunctions are premises upon defendants' purported violations of arbitration awards obtained via the grievance proceedings in the collective bargaining agreement between the City of Allentown and the FOP, representing plaintiff's interests as a union member. Plaintiff appears to assert that defendants' continuing attempts to permanently terminate his employment with the Allentown Police Department constitute both proof of an ADA violation and of an improper attempt to circumvent the arbitration awards, and, therefore, support equitable relief. Thus, plaintiff ultimately seeks to enjoin defendants from terminating his employment at all.

There is no basis, however, under the extant complaints, and/or pursuant to the outcomes of the grievance proceedings for plaintiff's injunction requests. In the first instance, as noted, plaintiff has failed to state a cognizable ADA claim. Consequently, he most certainly cannot demonstrate a likelihood of success on the merits of his substantive ADA claims, since we have concluded that such claims must be dismissed.

In addition, plaintiff is attempting to convert essentially procedural victories in the grievance proceedings into substantive decisions concerning the accuracy of the

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principles might apply thereto, or whether, for any other reason, a future claim under the ADA might be foreclosed.

psychological reports upon which defendants rely in seeking to terminate his employment, and thence, to bootstrap to success on his ultimate position that the psychological reports are an improper basis for terminating his employment as a police officer. Thus, plaintiff asserts that because defendants failed to fully reinstate him to his position as ordered after the first grievance arbitration and failed to assign him a permanent light duty position in the police department as ordered after the second grievance arbitration, this Court should conclude that defendants cannot rely upon psychological reports that plaintiff cannot function adequately as a police officer, and, therefore, are foreclosed from continuing their attempt to permanently terminate plaintiff's employment on that basis.

Aside from the fact that such argument represents the quintessential non sequitur even if its premises were accurate, plaintiff blatantly misstates or misinterprets the substantive outcomes and effects of the arbitrations. Indeed, the first arbitration decision no longer has an substantive effect, since it was appealed to the Lehigh County Court of Common Pleas, resulting in a ruling which supersedes the arbitration decision. The court concluded that plaintiff was entitled to reinstatement only because city and police officials failed to afford him a pretermination civil service hearing for a non-disciplinary discharge. There was no issue before the court concerning plaintiff's actual fitness for duty, the substantive basis for his termination. Rather, the only issue before the court and the only issue decided was the propriety of the procedures employed by city and police officials to terminate plaintiff's employment.

Significantly, although plaintiff was not permitted to function as a police officer after he was reinstated to his salary and benefits, he filed no grievance or other proceeding at that time to contest his status, i.e., employed by the

Allentown Police Department but not functioning as a police officer.

Plaintiff's second grievance, commenced by the FOP only after defendants assigned plaintiff to "light duty," contested the nature of the work plaintiff was required to perform while awaiting the continuation of his suspended termination hearing. Nothing in the grievance itself or in the arbitration award suggests that there was any bargaining agreement violation inherent in either requiring plaintiff to report for temporary "light duty" or in refusing to permit plaintiff to resume full police duties pending the outcome of termination proceedings.

There is, therefore, absolutely no basis for injunctive relief arising from the allegations of the complaints in this matter or from the grievance arbitration decisions plaintiff or the FOP successfully pursued. Accordingly, plaintiff's motion for permanent injunction and plaintiff's second motion for preliminary injunction will be denied.

2. Due Process and Free Speech Claims

In response to defendants' motion for summary judgment, plaintiff has not articulated a substantive basis for his current Fourteenth Amendment denial of due process claims or for his First Amendment retaliation claim. As noted in this Court's summary judgment opinion in the prior case which arose from the same underlying facts, after the state court affirmed the grievance arbitration decision that plaintiff was denied due process by the manner of his termination, plaintiff was reinstated to the Allentown Police Department and again began receiving his previous salary and benefits pending completion of an appropriate termination hearing. Although plaintiff was recently notified of his termination once again, it appears that such notice was specifically designed to implement plaintiff's decision to pursue a hearing under the grievance arbitration provisions of the collective bargaining agreement rather than under state local agency

law. Moreover, there is no doubt that plaintiff is fully aware of the reasons for his termination and was fully aware that formal action to terminate him would be taken in accordance with procedures mandated by the collective bargaining agreement. Plaintiff, therefore, has been afforded both notice and an opportunity to be heard with respect to defendants' most recent actions to terminate his employment.

To the extent that plaintiff again intends to assert claims arising from the original notice of termination in 1990, such claims are entirely foreclosed since they have been fully litigated in either the state courts or in this court, and, in any event, are now barred by the statute of limitations.

If plaintiff intends to contest his immediate suspension from duties in 1994, after reinstatement as ordered by the unappealed Court of Common Pleas decision affirming the arbitrator's award, his claim fails because he suffered no deprivation of whatever property right to public employment exists. There is no dispute that plaintiff received his full salary and benefits as a police officer despite his suspension from duties. Whatever property right plaintiff has in his employment as a police officer inheres in such tangible rewards of employment, not in performing the duties of a police officer. Plaintiff has presented no evidence or legal argument that there is a separate right to daily job satisfaction enforceable by a §1983 action under the Due Process Clause of the Fourteenth Amendment.

Finally, the Fourteenth Amendment provides no absolute right to continued employment as a police officer; it requires only that such employment not be terminated absent notice and an appropriate hearing. As noted, plaintiff is receiving the requisite process via his election to contest his termination under the grievance provisions of the collective bargaining agreement between the City of Allentown and the FOP.

Plaintiff's First Amendment retaliation claims are nothing more than another attempt to state a claim by means of circular pleading and bootstrapping. Plaintiff asserts only that defendants are now seeking to terminate him in retaliation for pursuing grievance procedures and court actions to resist prior attempts to terminate his employment. It is clear, however, even from the allegations of the complaint, that plaintiff understands that the current defendants are attempting to terminate his employment on the same basis that prior city and police officials sought to terminate plaintiff's employment as a police officer, i.e., that he is psychologically unfit for duty. Plaintiff has pointed to absolutely no evidence of any facts which support a retaliation claim.

We will, therefore, grant the summary judgment motion of the defendants against whom plaintiff asserted First and Fourteenth Amendment claims under 42 U.S.C. §1983 with respect to such claims, although we will dismiss without prejudice the ADA claims asserted against those defendants.

III. Summary

Having concluded that plaintiff has failed to allege all of the essential elements of an ADA claim, and in addition, is seeking relief which cannot, in any event, be granted with respect to the ADA claim he purports to assert, we will dismiss plaintiff's ADA claims against all defendants without prejudice to plaintiff's ability to assert a proper ADA claim in the future, if warranted. We will likewise, therefore, dismiss the action in which the City of Allentown is the only defendant, and dismiss plaintiff's ADA claims in the action in which William Heydt and John Stefanik, as well as the City of Allentown, are defendants. We will, however, deny the summary judgment motions of all defendants with respect to plaintiff's ADA claims.

Having further concluded that plaintiff has not met his summary judgment burden of coming forward with evidence

in support of his First and Fourteenth Amendment claims, we will grant the motion of defendants Heydt, Stefanik and the city of Allentown with respect to plaintiff's §1983 claims and enter judgment in favor of the defendant and against the plaintiff on such claims.

Finally, to the extent that plaintiff asserts pendent state law claims under the Pennsylvania Wage Payment and Collection Law and under the collective bargaining agreement between the City of Allentown and the FOP,. We will decline to exercise jurisdiction over such claims in accordance with 28 U.S.C. §1367(c)(3), and, therefore, such claims will likewise be dismissed.

An appropriate order will be entered in each of the pending actions to give effect to the foregoing conclusions.

IN THE MATTER OF ARBITRATION	:	
BETWEEN	:	DECISION IN NON-DISCIPLINARY GRIEVANCE (JAMES R. BALLIET)
CITY OF ALLENTOWN	:	
AND	:	
QUEEN CITY LODGE NO. 10, FRATERNAL ORDER OF POLICE	:	

AAA FILE NUMBER: 14 390 01064 97 Q

GRIEVANCE: The grievance protests the improper termination of the Grievant.

AWARD: The grievance is sustained as set forth hereinafter.

HEARING: February 6, 1998; Allentown, Pennsylvania.

ARBITRATOR: Edward J. O'Connell

APPEARANCES

For the Township

Patricia Siemiontkowski, Assistant Solicitor
Scott Mitchell, Assistant Chief of Police
Ronald S. Manesco, Captain
Joanne Regina, Ph.D., Witness

For the Union

Gary Lightman, Counsel
Eric Stoltenberg, Counsel
Tony Caputo, Counsel
Irwin Farbman, Ph.D., Witness
Glenn Kerrigan, Witness
James Balliet, Grievant

ADMINISTRATION

By letter dated July 17, 1997, from the Philadelphia Regional Office of the American Arbitration Association the undersigned was notified of his appointment to hear and decide the captioned matter. A hearing went forward on February 6, 1998, where the parties presented evidence and testimony in support of the positions adopted and where the Grievant appeared and testified on his own behalf. The record was closed upon receipt of Post Hearing Briefs and the matter is now ready for final disposition.

INITIATING CORRESPONDENCE AND QUESTIONS TO BE RESOLVED

On May 22, 1997, the Grievant was notified by letter of the City's intent to terminate his employment as a Police Officer. The letter stated as follows:

> On Friday, May 30, 1997, at 9:50 a.m., I met with the Assistant Police Chief Scott Mitchell and Captain William Warmkessel for the purpose of reviewing the City's evidence in this case and your response to that evidence as contained in Attorney Stoltenberg's letter of May 30, 1997 to me and of determining your

fitness for continued service as an Allentown police officer.

Nder Section 21 of the Collective Bargaining Agreement, the City shall have the right to remove officers from the payroll and terminate the officer's employment with the City if the officer is permanently unable to perform the essential functions of an Allentown police officer. These essential functions are contained in the Allentown Police Department Manual of Rules and Regulations and can be found in the Forward, Section 201 (General Responsibilities) and Section 300 (Police Officer Job Description).

Assistant Chief Mitchell, Captain Warmkessel and I carefully reviewed the reports and psychological assessments of George M. Perovich, Ed.D., Joanne M. Regina, Ph.D. and Irwin Farbman, Ph.D., as well as the letters prepared and submitted by Thomas L. Williams, M.D. and Magnus Likovics, M.D. Based upon these reports, it was determined that while you suffer from no psychiatric or psychological disorder, you do possess personality traits which render you unfit for continued service as an Allentown police officer. In addition, evidence of incidents reflecting your attitude toward and performance on the job during the period you served as an Allentown patrol officer between 1985 and 1990 further supports this finding.

Based upon all of the evidence of record, the City of Allentown finds you unfit for continued service as an Allentown police officer and hereby gives you formal notice of the termination of your employment effective Friday, May 30, 1997.

Please be advised that pursuant to the Collective Bargaining Agreement between the Fraternal Order of Police, Queen City Lodge #10, and the City of Allentown you have the right to grieve this determination through the grievance arbitration procedure.

Very truly yours,
Gerald M. Monahan, Jr.
Chief of Police

A response from the Grievant's attorney was provided on May 30, 1997. It stated:

This letter is to advise you that Lightman Law Offices has been retained to represent Officer Balliet in regard to his proposed termination from the Allentown Police Department. It is also a response, on behalf of Officer Balliet, to the charges set forth in your May 22, 1997 letter.

The City points to an enumerated list of events as evidence that Officer Balliet cannot perform the "essential functions" of an Allentown Police Officer. Critically, these events occurred during a period beginning in 1985 and ending in April of 1990, some seven years ago. Since that time, Officer Balliet returned to work (in August of 1995) and to date has not been disciplined, counseled or even questioned on the performance of his duties. The events cited in your letter are simply "stale." Moreover, we are unaware of any duly promulgated list of "essential functions", and request that we be provided with documentation to evidence their adoption.

The City also relies upon the medical reports of George M. Perovich, Ed.D. and Joanne M. Regina, Ph.D. as evidence that Officer Balliet's inability to follow the rules and regulations essential to the functioning of the department is due to some inherent psychiatric inadequacies. These reports are also stale. The most recent examination by Perovich was completed in August of 1990, and Regina's latest report was authored in 1994. It strains the bounds of logic to accept such outdated reports as an accurate representation of Officer Balliet's current condition. Even assuming, arguendo, that the evaluations are timely, they fail to support the contention that Balliet cannot perform the essential functions.[1]

It must be observed as significant that the reports of both doctors fail to state that Officer Balliet is suffering from any identifiable psychiatric condition. Rather, they only refer to "traits" that my present potential problems in the future. In fact, Regina testified before the Civil Service Board in 1994 that it is entirely possible that someone with the exact same predispositions as Officer Balliet would have no disciplinary record in a career with the department (N.T., 92-94). This is not sufficient to demonstrate an inability to meet essential functions, whatever they may be. Instead these conclusions portray an officer who had minor difficulties with a supervisor.

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[1] Critically, the department rules and regulations do not specify what the "essential functions" of a police officer comprise. The factors that comprise the essential functions should have been provided to Perovich and Regina, not to mention the FOP, for presentation to its chosen psychiatrists. It is improper for "essential functions" to simply have that definition which the Chief of Police chooses to assign it.

Moreover, there are several psychiatrists who examined Balliet and disagree with the conclusions of Perovich and Regina. Thomas L. Williams, M.D., examined Balliet on August 8, 1990 and his report was reviewed by Dr. Regina. According to William's, "Mr. Balliett, at this time does not exhibit any degree of depression or anxiety of a clinical nature... Admittedly, he does have some problems with authoritarian figures but I see no reason that should interfere with his return to work." In addition, Magnus Lakovics, M.D., evaluated Officer Balliet on September 17, 1990. Lakovics stated that Balliet did have some difficulty with his supervisor which may have caused some depression, however, if he was depressed at any time, he is now completely recovered. Lakovics noted that while Officer Balliet feels his supervisor was partly responsible for any problems, he did take some responsibility himself, which demonstrates "a reasonableness of judgment." Lakovics then released Balliet for a return to work.[2]

Although Farbman recognized that Officer Balliet has defined personality traits, those traits do not make him unique or unfit for police work. Farbman released Balliet for a return to duty.

It is patently improper for the City to resurrect events for which Officer Balliet was already counseled or otherwise disciplined and to use these events against him years later. These past events and the medical reports that reference them are outdated. The medical reports alone are without adequate support to justify

[2] Lakovics' report was also reviewed by Dr. Regina.

the termination of a police officer's employment. Even in 1990, the findings of Perovich were disputed by two competent psychiatrists and then later by a third, Dr. Farbman.

The City should not ignore the fact that the events cited from 1985 through 1990 are at best minor infractions handled via counseling rather than more severe corrective techniques. The May 22, 1997 letter organizes these instances into a format suggestive of a problematic employee. If Officer Balliet's actions were so grossly disruptive then why were they handled simply through counseling or minor discipline. The most likely explanation here is the situation described by Dr. Lakovics: personal difficulties existed between Balliet and his Sergeant, which led to alleged minor infractions. It is unlikely that such a situation exists at present given the time that has passed, and the clean employment record since Balliet's return.

Based on all of the foregoing, the City should determine that Officer Balliet's termination is not supported by the evidence presented and is thus not in either parties' best interests. The proposed termination should thus be abandoned.

On June 2, 1997, the Chief sent the following letter to the Grievant:

By letter dated April 8, 1997, from Attorney Gary Lightman, the City was informed of your decision, pursuant to Section 21 of the police contract, to elect grievance arbitration in lieu of a civil service hearing to contest a non-disciplinary termination.

The purpose of this letter is to advise you of the City's intent to terminate your employment based upon the evidence outline in the following paragraphs and to give you the opportunity to respond to that evidence and to provide the City with any additional information you with the City to consider in making its decision in this matter.

As you know, it is the belief of the City of Allentown and its Department of Police that you are unfit for continued service as an Allentown police officer based upon your being unable to perform the essential functions of that position. This belief is supported by the following evidence:

1. A comprehensive report prepared by George M. Perovich, Ed.D., and based upon the results of clinical interviews and psychological sessions conducted and tests administered between November, 1989 and May, 1990. In his August 27, 1990, report, Dr. Perovich found that "Mr. Balliet does not want, nor is he suited, to be a policeman. His character style is one that does not lend itself to chain of command authority situations. If Mr. Balliet stays on the police force, it is reasonable to expect him to continue to disregard established rules and polices when he disagrees with them, if not actually endangering his or the life of someone else."

2. A June 8, 1994, comprehensive report prepared by Joanne M. Regina, Ph.D., and based upon the results of a clinical interview

and a series of tests administered on June 8, 1994. Dr. Regina, in her report, found your psychological profile to be "not consistent with what would be expected for someone involved in a successful career in law enforcement." She found you to be "vulnerable to regression under stress" and to "exhibit poor judgment, variable decision making, and ineffective coping strategies" and that "these traits do not appear to be the results of short term stress reaction, but rather long term chronic personality traits." Dr. Regina concluded that your "personality characteristics are so entrenched that it was unlikely that...[you] could reorganize and be successful in law enforcement."

3. A series of incidents involving failure to follow established rules and policies. These include but are not limited to the following:

January 20, 1985, incident involving your leaving of keys in your assigned cruiser car while the car was running, unlocked and unattended, in violation of General Order 401 of the Rules and Regulations of the Allentown Police Department, which action eventually led to the cruiser being stolen.

March 9, 1988, incident involving your failure to give your location to the radio dispatcher and to report the disposition of a complaint in violation of General Order 414 of the Rules and Regulations of the Allentown Police Department.

February 4, 1989, incident involving your failure to acknowledge receipt of a call of lockout and your failure to give your location over the radio as required by General Order 414 of the Rules and Regulations of the Allentown Police Department.

Incidents on October 30, 31 and November 1, 1989, involving your failure to wear a tie in accordance with General Order 302 of the Rules and Regulations of the Allentown Police Department after being ordered to do so on several occasions.

November 20, 1989, incident involving your firing of a warning shot in violation of General Order 403 of the Rules and Regulations of the Allentown Police Department.

February 23, 1990, incident involving your failure to check your vehicle for equipment and your resulting failure to respond to a lock-out call.

March 6, 1990, incident involving the writing and submission of incomplete and unsatisfactory offense/incident reports and your general attitude of defiance toward supervisors.

April 1, 1990, incident involving your continued failure to follow radio procedure by failing to respond to calls and by refusing to give your location on the air as required by

General Order 414 of the Rules and Regulations of the Allentown Police Department.

4. A counseling session on March 13, 1990, and subsequent conversations you had with then-Lieutenant Ronald Manescu shortly after the March 13, 1990, session which pertained to your performance as a patrol officer and your attitude toward your work, leading then-Lieutenant Manescu to fear for your safety and the safety of fellow police officers.

Based upon all of this evidence, it is the opinion of the City of Allentown and its Department of Police that you are unable to perform the essential functions of an Allentown police officer and that your employment should be terminated.

As stated above, you have the opportunity and the right to respond to the evidence set forth in the preceding paragraphs and to provide additional information to be considered by me in reaching a final decision in this matter. You may respond in writing to me on or before May 29, 1997, or in person on May 30, 1997, at 9:00 AM in my office.

The matter was then made the subject of an arbitrable complaint. The question to be resolved is whether or not the Grievant was properly terminated.

CITED PORTIONS OF THE AGREEMENT

The following portions of the Agreement (Joint Exhibit-1) were cited by the parties:

Section 21. NON-DISCIPLINARY TERMINATIONS

The City shall have the right to remove officers from the payroll and terminate the officer's employment with the City if the officer is permanently unable to perform the essential functions of an Allentown Police Officer.

Officers shall have the option to contest non-disciplinary terminations through the arbitration procedure or a civil service hearing. The adjudicating body shall not review the officer's claim under a just cause discipline standard, but rather shall only review whether the officer can perform the essential functions of an Allentown Police Officer. The adjudicating body must consider medical and vocational testimony and make findings regarding same.

In addition, reference was made to the City's Police Officer Job Description (Joint Exhibit-3) attached hereto as Appendix A.

FACTUAL BACKGROUND

The factual background to this matter, although extensive procedurally, is not disputed by the parties. The Grievant was hired in 1984 as an Allentown Police Officer. During the duration of his employment, the Grievant was cited for various infractions of Police Department rules and regulations. It is undisputed that while no disciplinary action was taken, counseling sheets were issued for the incidents listed in the City's May 22, 1997 letter to the Grievant.

In the beginning of April of 1990, the Grievant was referred for psychological treatment. On April 5, 1990, he met with George M. Perovich, Ed.D., a clinical psychologist, who interviewed the Grievant and administered various psychological tests. Dr. Perovich submitted a five page report to Chief of Police Wayne T. Stephens, dated August 27, 1990, in which he made a number of observations and findings. His report concluded with the following:

> Considering all of the above I firmly believe that Mr. Balliet does not want, nor is he suited, to be a policeman. His character style is one that does not lend itself to chain and command authority situations. If Mr. Balliet stays on the police force it is reasonable to expect him to continue to disregard established rules and policies when he disagrees with them, if not actually endangering his or the life of someone else.

After receiving Dr. Perovich's report, Police Chief Stephens terminated the Grievant's employment as an Allentown Police Officer, effective August 27, 1990.

On the grounds that his termination occurred without notice or a hearing, Officer Balliet filed a mandamus action against the City on October 25, 1990, seeking reinstatement to his former position. On December 2, 1991, the complaint was dismissed by the Lehigh County Court of Common Pleas. Upon Motion for Reconsideration, the parties agreed to have the matter heard by an arbitrator pursuant to the grievance procedure of the Collective Bargaining Agreement. By decision dated December 19, 1992, Arbitrator Thomas . DiLauro found that the Grievant's discharge in 1990 was improper for having violated the Grievant's due process rights The Grievant was reinstated without back pay or benefits. Arbitrator DiLauro's decision was affirmed on

other grounds by the Common Pleas Court of Lehigh County, by Order dated March 23, 1994.

Following this award, the City placed the Grievant on paid suspension. Subsequently on August 4, 1995, the City assigned the Grievant to a light duty position at the City Hall Information Desk. As a result of this assignment, the Union filed a grievance challenging the job placement as being outside the bargaining unit. This grievance was sustained by Arbitrator Alan A. Symonette, by decision dated September 16, 1996. Thereafter, the Grievant was placed in a new light duty position in the Identification Room.

Following his return to light duty work, the City once again attempted to terminate the Grievant's employment by scheduling a civil service hearing on the issue of the Grievant's fitness for duty. Prior to this hearing, the civil service regulations were unilaterally amended to include issues of non-disciplinary terminations. As a result, the Union filed an unfair labor practice charge against the City, contesting the unilateral adoption of these regulations. While the civil service proceedings were being conducted, the Pennsylvania Labor Relations Board (PLRB) granted the Union's unfair labor practice charge. The parties were thereby required to bargain collectively over the issue of non-disciplinary terminations. The issue was bargained to impasse before finally being placed before an Interest Arbitration Panel in 1995. Pursuant to the 1996-1998 Act 111 Interest Arbitration Award, the parties included Section 21 in the Collective Bargaining Agreement.

On April 4, 1997, the City notified the Union that civil service proceedings to terminate Officer Balliet would be resumed. In response, the Union requested the arbitration procedure in lieu of a civil service hearing.

A hearing went forward on February 6, 1998, at which time the City presented the testimony of Joanne M. Regina, Ph.D., a clinical psychologist. Dr. Regina testified that one third of her practice is devoted to performing psychological screenings and assessments of law enforcement personnel. In addition, she stated that she is extensively published in the field. Dr. Regina testified that she performed a psychological examination of the Grievant on June 8, 1994 at the request of the City. Her examination included an MMP1-2 evaluation, a Rorschach test, and an interview. Based upon her examination, Dr. Regina concluded as follows:

> SUMMARY AND RECOMMENDATIONS
>
> While no evidence of significant psychopathology was found, evidence of limited emotional controls, difficulty processing ambiguity, and poor coping skills are evidence. Mr. Balliet's personality profile suggests that he is someone who functions best in environments which provide him with consistency, stability, and structure. Persons with limited capacity to manage stress and cope with the demands of daily life tend to function best in environments that are predictable and where the expectations and rewards are similar and they have a certain degree of control over their environment. Such persons would not function effectively over a prolonged period of time in police work because the demands vary, the expectations change, and requiring him to attend to numerous details would be problematic for Mr. Balliet. He is susceptible to regression under periods of prolongs or unexpected stress. Reactions of "burnout", poor judgment, and behavior that may not coincide with societal demands are common in

persons with similar profiles. This is especially true when exposed to stressful situations or when placed in environments with ambiguous demands and expectations.

In summary, Mr. Balliet's psychological profile is not consistent with what would be expected for someone involved in a successful career in law enforcement. He is vulnerable to regression under stress and may exhibit poor judgment, variable decision making, and ineffective coping strategies. The above described traits do not appear to be the result of a short term stress reaction but rather long term chronic personality traits. Even if Mr. Balliet were to undergo intensive psychotherapy, his personality characteristics are so entrenched that it is unlikely that he could reorganize and be successful in law enforcement.

After reviewing the Grievant's personality traits in conjunction with the Allentown Police Officer Job Description (Appendix A, hereto), Dr. Regina testified at the hearing that the Grievant was unable to perform twenty-five of the twenty-six items listed as job duties of the position. Dr. Regina concluded that the Grievant was unable to perform the essential functions of an Allentown Police Officer. Dr. Regina was cross-examined on her familiarity with the Police Officer Description and the relationship between the personality traits she found in the Grievant and his ability to perform the functions of a police officer.

The City also presented the testimony of two Police Department supervisors, Captain Ronald Manescu and Assistant Chief Scott Mitchell. Captain Manescu testified as to the events leading up to the Grievant's initial termination in 1990. He described the multiple incidents for which the

Grievant received counseling sheets during the period of 1985 through 1990, the most serious of which was the firearm regulations violation that occurred in November of 1989. Furthermore, Assistant Chief Scott Mitchell testified that due to the City's concern for the Grievant's safety, as well as the safety of his fellow officers and the public at large, the Grievant was not permitted to serve as a Police Officer at any time after the City received Dr. Perovich's August 27, 1990 report.

The Union presented the testimony of Irwin Farbman, Ph.D. Dr. Farbman testified that he examined the Grievant on two occasions - on October 20, 1994 and on January 23, 1998. In regard to the October 20, 1994 examination, Dr. Farbman testified that he reviewed prior evaluation reports, conducted a clinical interview and performed various diagnostic tests. At that time, Dr. Farbman summarized his findings as follows:

> Summary:
>
> At issue seems less the nature of Mr. Balliet's psychological presentation than its implications for employability as a police officer. He does not have a diagnosable psychiatric disorder. Nor can it be said of him that he has a personality *disorder* although he does have well defined personality *traits*. Those traits, which simultaneously cause him to feel dependent upon authority for approval and yet resentful of the need for such an external reward in order to feel himself worthy, may make for the reported authority stresses in the past. But he is unlikely to be unique in having such traits and he does not have a history of such personality qualities having had a profoundly disruptive effect upon his work and

relationships. He does appear to have anger management problems but historically seems to have kept such difficulties well within his control. I am not able to say that Mr. Balliet has the "ideal" temperament to be a police officer. But neither can I say that the personality qualifies that he does display are sufficient to indicate that he is unfit for law enforcement work. While this may not be an unequivocal and ringing endorsement, it is intended to be in support of Mr. Balliet's request for reinstatement.

With respect to the January 23, 1998 examination, Dr. Farbman testified that he conducted a variety of psychological tests, including a Personality Assessment Inventory, a Beck Depression Inventory, a Millon Clinical Multiaxial Inventory—II, a Thematic Apperception Test and an Incomplete Sentence Test. Dr. Farbman reported as follows in his Summary:

Summary

The stresses of the past seven years have taken their toll. He is currently adequately medicated for depression and anxiety. Those symptoms result from the stresses of his employment, uncertainty compounded by the end of his marriage. The PAI indicates that it is the presence of stress that serves as the major disturbance to his well being at this time. There are no indications of psychopathology or personality disorder on that, or any of the other instruments in the test work related stresses (dealing with his treatment subsequent to disciplinary action in 1990). All subsequent evaluations have not found diagnosable emotional disturbance. The identification

of difficulty in acceptance of an authority hierarchy occurred in the midst of a protracted confrontation with that authority which threatened his livelihood and self-worth. All evidence points to his reaction as a state disturbance (that is, a reaction to stressors outside of the norm) and not to a trait disturbance (one that is inherent and which will be seen across multiple life situations).

Resolution of his conflict with the administration of the Police Department holds the likelihood of the ability to assume his former work responsibilities without further need for psychotropic medication.

Dr. Farbman was subjected to extensive cross-examination regarding the relevance of his professional qualifications and comparisons between his 1994 and 1998 examinations.

Finally, the Grievant testified briefly regarding his employment as an Allentown Police Officer, as well as his current situation and mental state.

CONTENTIONS OF THE PARTIES

City Contentions

The City contends that it had adequate reason and sufficient evidence to impose a non-disciplinary termination upon the Grievant, pursuant to Section 21 of the Collective Bargaining Agreement. It maintains that the evidence established that the Grievant is permanently unable to perform the essential functions of an Allentown Police Officer.

Initially, the City argues that the Police medical expert, Dr. Farbman, lacks the credentials and experience necessary to

perform psychological evaluations for law enforcement personnel. While the City does not dispute that Dr. Farbman is a licensed clinical psychologist, it emphasizes that he admittedly does not perform pre-employment screenings or assessments for law enforcement. Furthermore, the City asserts that Dr. Farbman does not possess specialized training or experience that would qualify him to evaluate the psychological condition of police officers. The City asserts that Dr. Regina is far more qualified as an expert. It observes that Dr. Regina testified that one third of her professional practice is devoted to law enforcement personnel evaluations. Finally, the City notes that Dr. Regina is extensively published in her field. For these reasons, the City asserts that Dr. Farbman's psychological assessment of the Grievant should be given little, if any, weight.

The City also contends that even if it is found that Dr. Farbman possesses the necessary credentials, his opinions should be rejected for being inconsistent with the opinions of both Dr. Perovich and Dr. Regina. The City notes that Dr. Perovich observed and interviewed the Grievant on nine occasions during the period of November of 1989 through May of 1990. The City asserts that Dr. Perovich's conclusion that the Grievant's character style did not lend itself to a successful career in law enforcement, was substantiated by the findings of Dr. Regina in her June 8, 1994 evaluation. Furthermore, the City maintains that in his October 20, 1994 evaluation, Dr. Farbman agreed that although the Grievant did not suffer from a personality disorder, he possessed personality traits that suggested that he harbored feelings of anger, resentment and alienation. The City argues that Dr. Farbman attempted to downplay the significance of these traits in his January 23, 1998 evaluation report. It is the City's contention that Dr. Farbman's January 213, 1998 evaluation is therefore not only inconsistent with the opinions

of two well-known experts, Dr. Perovich and Dr. Regina, but also inconsistent with his prior evaluation of October 20, 1994.

Finally, the City claims that the testimony of Dr. Regina is more probative and credible than that of Dr. Farbman. It argues that unlike Dr. Farbman, Dr. Regina reviewed the essential functions of an Allentown Police Officer, as well as the Grievant's work history. The City points out that Dr. Regina discussed at length those personality characteristics of the Grievant that rendered him unsuitable for police work. The City also argues that, after reviewing the essential functions of an Allentown Police Officer, Dr. Regina credibly testified that the Grievant is unable to perform the requisite duties of that job. The City maintains that the Grievant's November of 1989 firearms violation is illustrative of his personality style. The City asserts as well that the Grievant's personality style renders him unable to follow police procedure and regulations.

On the grounds that the evidence proves that the Grievant is unable to perform the essential functions of an Allentown Police Officer, the City seeks to have the grievance denied and the non-disciplinary termination upheld.

Police Contentions

The Police contend that the Grievant's non-disciplinary termination was improper since the City failed to prove that the Grievant was permanently unable to perform the essential functions of an Allentown Police Officer. They initially assert that the City failed to define the essential functions of the job. The Police maintain that the submitted document entitled "Police Officer Job Description" (Appendix A, hereto), was merely an itemization of some but not all, of the day-to-day

duties of an Allentown Police Officer. It is the contention of the Police that the job description fails to delineate the minimum requirements necessary for the job, including standards regarding mental health. Furthermore, they assert that the job description does not require an officer to submit to or pass a psychological evaluation.

In that connection, the Police assert that the City's medical expert, Dr. Regina, was admittedly unaware of the essential functions of the position at the time of her examination of the Grievant. They argue that Dr. Regina was therefore unqualified to determine whether the Grievant could have performed the essential functions of the job.

The Police stress a further claim that neither Dr. Regina nor Dr. Perovich actually stated that the Grievant was permanently unfit for duty. They maintain that Dr. Regina's testimony that the Grievant's personality characteristics are such that he is unlikely to succeed in law enforcement is insufficient as nothing more than conjecture. The Union also asserts that Dr. Regina did not distinguish between personality traits that may be permanent and psychological states that are temporary due to outside influences. They reject Dr. Regina's conclusions as well as those of Dr. Perovich in 1990 as failing to identify any permanent psychological state which would demonstrate a permanent inability to perform the job.

In contrast, it is the contention of the Police that its medical evidence established that the Grievant is capable of performing the duties of an Allentown Police Officer. They point out that four expert reports were submitted which established that the Grievant was capable of performing the duties of a Police Officer. In addition to Dr. Farbman's findings, those include reports by Stephen J. Barrett, M.D.,

Thomas L. Williams, M.D. and Magnus Lakovics, M.D., which were submitted as part of a City Exhibit. The Police also assert that Dr. Farbman, its medical expert in this proceeding, was the only doctor to have evaluationed the Grievant in the past four years. They maintain that in 1994, Dr. Farbman found that the Grievant was not suffering from a psychiatric disorder, but was rather exhibiting "subclinical elevations in some of the personality oriented scales", which purportedly manifested themselves in feelings of anger, resentment and alienation. The Police emphasize that Dr. Farbman concluded in his 1994 report that although the Grievant may not possess the ideal temperament for a police officer, his personality qualities are not sufficient to indicate that he is unfit for law enforcement work.

Finally, the Police argue that Section 21 of the Collective Bargaining Agreement requires the City to prove affirmatively that the officer is permanently unable to perform the essential duties of an Allentown Police Officer. They assert that Section 21 does not grant the City authority to terminate a police officer if the officer is merely "unlikely to succeed" in law enforcement. The Police maintain that in this matter, the City failed to meet the requisite burden of proof.

On the grounds that the City failed to meet the burden required for a non-disciplinary termination pursuant to Section 21 of the Collective Bargaining Agreement, the Police seek to have the grievance sustained.

DISCUSSION AND FINDINGS

There can be little doubt that Section 21 was inserted into the current collective bargaining Agreement with the case of the Grievant in mind. As the above recitation of facts establishes, the Grievant had been the subject of far too many

proceedings before arbitrators, the Lehigh County Courts and the Pennsylvania Labor Relations Board to believe that Section 21 was not drafted as a contractual response to the issues that his employment relationship with the City presented. It is crucial, therefore, to examine precisely what that provision states when determining how it is to be applied to what, despite its background, is a case of first impression.

The provision gives the City the right to terminate an employment relationship if it can be shown that an individual is permanently unable to perform the essential functions of a Police Officer. Termination may be challenged, but the provisions prohibits review under the traditional "just cause" discipline standard. Instead, review is limited to an assessment of whether the essential functions of the job can be performed. In making this determination, the adjudicating body, whether an arbitrator or civil review board, "must consider medical and vocational testimony" and "make findings" with respect thereto. Inasmuch as just cause standards are inapplicable, the test is whether or not the employee can do certain things, based on a consideration of specified testimony.

Along with arising in a non-traditional contractual setting, this matter also presents a unique history. Both the setting and the history highlight the novel nature of this dispute. In 1998, grievance arbitration is being invoked to assess the propriety of the termination of a Police Officer who last worked in that full capacity in 1990 and whose conduct in the five years before 1990 was the basis for assessments which occasioned his removal from the job at that time.

The first psychological examination of the Grievant's fitness was conducted in 1990, and two more examinations were carried out in 1994. The most recent examination of the

Grievant's fitness was that by Dr. Farbman in 1998. Chronologically, only Dr. Farbman's 1998 examination, which is the subject of intense City challenge on several grounds, provides any sort of current portrait of the Grievant.

Yet, on the basis of positions taken here by both Parties, assessments of the Grievant's fitness which were prompted in large part by behavior going well back into the 1980's are to be used in 1998 to determine his employability under a contractual standard which was not even put into place until 1196. Current ability to perform, in other words, is to be based on four examinations of the Grievant, one in 1990, two in 1994 and one in 1998, all but the last of which were precipitated by behavior which he exhibited in the 1980's.

In addition, and as might be expected, each side took contrasting views of the Grievant's ability to perform. Consequently, the professional opinions offered by their respective experts differed sharply.

Keeping all of this in mind, there is no alternative to finding that the City did not have the right, under the standard set forth in Section 21, to terminate the Grievant.

Viewing the evidence officered by the City most generously, it is impossible to conclude that the Grievant is permanently unable to perform the essential functions of the job. Without doubt, the City established a number of things quite emphatically, but what was proven did not approach the standard set by Section 21. In order to illustrate why the City's evidence fell short of proving what was necessary, it would be helpful to examine in detail what was established.

First, Dr. Regina made it clear that if the Grievant was applying for a position as a Police Officer with the City at any

time after her examination, he would be rejected. According to her testimony, the Grievant possesses a host of personality traits which would make him an extremely poor prospect as a Police Officer. She concludes that his personality profile is not consistent with successful performance and it is her prediction that he would not be likely to perform well in the job. Her testimony throughout, therefore, was couched in terms such as "may", "may not", "is susceptible", "prone", and "at risk". All of these terms are prospective in nature, and while they may surely provide ample justifications for not hiring any applicant, they do not come close to proving that the Grievant "is permanently unable" to perform the job. This, by agreement, is the showing required for the removal of an officer who is already on the payroll. One who is seeking employment, obviously, may be judged by a different standard. Evidence that an employee is "unlikely" to do the job is simply not sufficient.

Accordingly, the fact that the Grievant would be turned down if he presented himself as an applicant for a job as a Police Officer because of the likelihood that he would be unable to do the job is not proof that he is presently "permanently unable" to perform the essential functions of the job. Whether or not he is "likely" to be able to perform, given what Dr. Regina identified as a number of personality traits, may be doubtful. Critically, however, as acknowledged on cross-examination, she did not and cannot state that the Grievant "is permanently unable" to perform the essential functions of a Police Officer.

A second fact established convincingly by the evidence is that in the 1980's the Grievant was not deemed by the City to be performing many of the essential functions of the Police Officer's job. The litany of his transgressions leaves no doubt that his performance was not meeting with supervisory

approval, and there can be no question that in many employment settings his job would have been in serious jeopardy. While recognizing that there are always two sides to any story, it is still clear that the Grievant's conduct prior to 1990 was the type which usually produces a disciplinary response from an employer.

Customarily, when employees are charged with violating rules of conduct, disputes ensue over the propriety of the discipline. If discipline is justified, the next offense results in increasingly severe punishment. If the poor behavior continues, the offending employees eventually lose their jobs. If, on the other hand, the imposition of more severe penalties causes employees to alter their behavior and begin to conform to the employer's standards, the process can be a positive one for both sides. All of this is called progressive discipline, and while it may be considered quaint and old-fashioned by some, it has been shown, over the years, in both the public and private sectors, to be a way to get non-conforming employees to alter their behavior or, if they do not, to get them off the payroll.

Despite the proven benefits of this type of employer-initiated response to what it now refers to as "oppositional behavior", the City chose to deal with the Grievant in a different fashion. It engaged in a series of "counseling sessions with him, which did not involve the imposition of any form of punishment. Instead of responding to his alleged transgressions with verbal and written warnings, followed by suspensions involving a loss of pay and, ultimately, discharge, if he did not improve his behavior, the City "counseled" with him until 1990, when it decided to terminate his employment. Although admittedly hindsight, it is interesting to consider what might have happened to the Grievant if his first offense had been met with a verbal warning, and the City had then

followed up on succeeding transgressions with progressively severe punishment, rather than counsel with him. Viewed from a 1998 vantage point, and with some awareness of what the application of progressive discipline has produced in other, similar, employment settings, it is not difficult to envision a different response by the City in the 1980's resulting in either a modification of the Grievant's on-the-job behavior or his discharge. Either way, the Parties would not be dealing with the matter here in dispute.

Although it has shown that it would not now hire the Grievant, and that his performance was far from exemplary during the 1980's the City's proof fell far short of what Section 21 requires to terminate his employment. The test is not whether the Grievant "is permanently unlikely", or "was unable." The language which was adopted in 1996 is clear and specific. It states that a non-disciplinary termination is permitted if the officer "is permanently unable". The showing must be of a current and fixed inability. It is not enough to demonstrate a past inability, a present unlikelihood or a potential inability. Yet that is all that was established by the City's evidence.

Assuming that everything Dr. Regina concludes is true, the Grievant may have difficulty in doing the job, and he may be an unlikely candidate to be a successful Police Officer. Even if one were to adopt all of her testimony at face value, the most it would show is that she would recommend against hiring the Grievant, and that she rates him as a poor risk to succeed. "At risk", however, is not the same as "permanently unable", and the presence of personality traits which suggest a difficulty in following orders is not proof of a permanent inability to carry out the essential function of a Police Officer.

The Grievant has not been shown to be currently "permanently unable" to do the job, which is what Section 21 requires. He must be returned to his job as Police Officer with the City and he must be made whole for all lost wages and benefits from the time of his termination.

While they may be dismissed, observations on the Grievant's return to work are deemed to be in order. On his return he should remember that if he was applying for the first time for a job as a City Police Officer, he would be turned down. No one could quarrel with that decision. He must not lose sight of the fact that his conduct in the 1980's might well have led to the loss of his job if, instead of resorting to counseling, the City had done what most employers do to poorly performing employees. He cannot be held responsible for the management decisions made at that time by the City, but he must not forget that a different response on its part could have resulted in his discharge. If he should revert to the type of behavior exhibited in the 1980's, there may be little that his collective bargaining representative can do to save his job.

He has been identified as a poor prospect, and he is going back to work only because the City was unable to prove what is required by Section 21 of the Agreement. While he is to be returned to his job as a Police Officer, the conditions of his return in terms of assignments should be no different than any Officer returning to duty after an extended absence.

The Grievant must, in the final analysis, be made aware that he is not returning to work because he has been found to be a faultness employee. Rather, he is returning to work because the City was not able to provide the proof required to support termination under Section 21.

The grievance is found to have merit. It is sustained as set forth above.

BEFORE THE
AMERICAN ARBITRATION ASSOCIATION

IN THE MATTER OF:	)	
	)	
Fraternal Order of Police	)	
Lodge #10	)	Case No.
	)	14390 140 95 Q
and	)	
	)	
City of Allentown	)	
	)	
Grievance: Balliet/	)	
(Pavonarius) Molnar	)	
_____	)	

OPINION AND AWARD

Before: Alan A. Symonette, Esq.
Impartial Arbitrator

Appearances: Fraternal Order of Police
Lodge #10
David M. Green, Esq.

City of Allentown
Patricia Siemiontkowski, Esq.

Subject: Assignment, Recognition, Bargaining Unit, Management Rights, Contract Interpretation, Evidence

Date of the Grievance: August 21, 1995

Date of the Hearing: June 17, 1996
Allentown, Pennsylvania

Statement of the Award: The grievance is sustained. The City violated the Collective Bargaining Agreement when it assigned the grievants to a light duty assignment at the City Hall Information desk. The City is ordered to reassign the grievants to positions within the Police Department which are in compliance with their restrictions.

INTRODUCTION AND BACKGROUND

The Union, Fraternal Order of Police Queen City Lodge No. 10 represents the police officers and other sworn personnel of the Police Department of the City of Allentown. This matter concerns a grievance filed by the Union alleging that the City violated the Collective Bargaining Agreement when it placed two officers James Balliet and Susan

Pavonarius Molnar in a non-bargaining unit position while they were on light duty status.

The facts resulting in this controversy have a lengthy history but are not significantly in dispute. Officers Balliet and Molnar were both originally employed as officers in the Police Department. Officer Balliet was hired in August, 1984. Officer Pavonarius was hired in August, 1986.

On November 17, 1989, Officer Balliet submitted to an evaluation before psychologist George M. Perovich as a result of a shooting incident. On August 27, 1990 Dr. Perovich submitted a report concluding the following:

> "Mr. Balliet does not want, nor is he suited, to be a policeman. His character style is one that does not lend Itself to chain and command authority situations. If Mr. Balliet stays in the police force, it is reasonable to expect him to continue to disregard established rules and policies when he disagrees with them, if not actually endangering his or the life of someone else."

As a result of this conclusion and on the same date, the then Police Chief Wayne T. Stephens informed the

grievant that since he was not able to function as a police officer, his employment was terminated.

On February 27, 1991, grievant Susan Molnar was diagnosed as having epileptic episodes. As a result, on march 13, 1991 the Pennsylvania Department of Transportation determined that because of this medical condition, she could not safely operate a motor vehicle. Therefore, her driving privileges were suspended until she could demonstrate competency to drive. Based on these reports, Chief Stephens concluded that she could not discharge her duties as a police officer. He placed officer Molnar on ten days paid sick leave during which time they advised her to seek a disability pension. Officer Molnar did not make such an application. On May 31, 1991 Chief Stephens informed grievant Molnar that based on a report of a neurologist, she was not able to function as a police officer. Therefore, she was terminated from the department.

Both officers filed grievances which were submitted to arbitration.[2] Both arbitrators sustained the grievances to the extent that it was found that the City discharged the officers without affording them a full hearing to determine their ability to serve as police officers. The awards were appealed to the Court of Common Pleas by the City. Both awards were upheld. Consequently, on April 22, 1994, Officer Balliet was informed by Chief John Stefanik that he was being reinstated, then suspended with pay until a hearing could be held before the Police Civil Service Board to determine his continued fitness for service. Officer Molnar was informed of the same decision on July 7, 1994.

On August 4, 1995, both officers were ordered by Chief Stefanik to report for a "temporary interim light duty assignment as a City of Allentown employee" until a hearing

[2] Officer Balliet also filed a Mandamus action in the Lehigh County Court of Common Pleas seeking reinstatement. The parties eventually agreed to have the matter brought before an arbitrator.

could be held. Specifically, the grievants were not returning as police officers. According to the City, there were no permanent light duty positions in the Police Department and the City would not created such a position. The assignment required the grievants to monitor the information desk in the Allentown City Hall. This position is usually staffed by volunteers and is responsible for providing information to visitors and the security of the lobby area. They were instructed to report in civilian clothes and could not wear a badge or a gun. Both officers were assigned to the supervision of Jenny Lilly, the Assistant Bureau manager of the Bureau of Human Resources. Each officer worked a shift, one in the morning and one in the afternoon. Initially, they were to report all matters including sickness and vacation through Ms. Lilly. On August 21, 1995, the grievants both filed grievances stating that the assignments

were outside of the bargaining unit and in violation of the Collective Bargaining Agreement.[3]

On September 1, 1995 the Union informed the City that it was proceeding to arbitration pursuant to the Voluntary Labor Rules of the American Arbitration Association. The undersigned arbitrator was selected by the parties to hear the grievances. Prior to the hearing, specifically on January 26, 1996, the grievants' assignment was changed to require that they report directly to Captain Michael Combs. All other working conditions remained the same.

A hearing was held on June 17, 1996 in Allentown, Pennsylvania. During the hearing, the parties were represented by counsel who presented evidence through documents and the sworn oral testimony of witnesses. Counsel also had the opportunity to cross examine witnesses.

[3] The grievances were subsequently consolidated for hearing pursuant to the grievance procedure.

The hearing was closed after the conclusion of oral arguments.

ISSUE

Based upon the evidence and arguments submitted, the issue for resolution should be framed as follows:

Did the City violated the Collective Bargaining Agreement by assigning the grievants to the information desk?

SUMMARY OF RELEVANT CONTRACT PROVISIONS

1. RECOGNITION

A. The CITY hereby recognizes that the LODGE is the sole and exclusive representative of all employees in the unit as defined in Section 1B, with respect to collective bargaining for wages, rates of pay, hours of work, and conditions of employment, and the LODGE hereby recognizes its responsibility of representing the interests of all such employees.

B. The unit to which this Agreement is applicable is composed of all eligible employees in the Police Department except civilian employees, the Chief of Police and

the Assistant Chief of Police. Those employees to whom this Agreement applies shall sometimes hereinafter be referred to as "covered employees."

3. MANAGEMENT RIGHTS

A. Subject only to any limitations set forth in this Agreement, it is understood and agreed that the CITY retains the exclusive right to manage its business, including, but limited to, the right to direct the work force, the right to hire, promote, retain, transfer, and assign employees in positions; the right to suspect, discharge, demote, or take other disciplinary action. Nevertheless, the aforesaid right to suspend, discharge, demote, or take other disciplinary action shall be subject to the provision of the grievance procedure of this Agreement (20. GRIEVANCES). The CITY shall retain the right to maintain efficiency of the Police Department by determining the methods, the means, and personnel by which such operations are conducted and shall also have the right to take whatever actions may be necessary to carry out assigned missions in an emergency situation.

B. Matters of inherent managerial policy, such as hours of duty, scheduling, length of shifts, determination of methods and mains by which to operate the Police Department are reserved exclusively to the CITY, provided such

reservation does not conflict with any of the provisions of this Agreement.

ANALYSIS

The Union maintains that the City cannot place the grievant on the information desk. This decision is arbitrary, capricious and in violation of the Collective Bargaining Agreement. They allege that the position at the information desk is usually staffed by volunteers and is not within the bargaining unit. For the purposes of this dispute, the Union does not challenge the City's contention that the grievants are not capable of placing the grievants in a bargaining unit position on light duty status.

The Union further asserts that the city's policies and practices permit the placement of the grievants in a police related position. In this regard, the Union presented

evidence showing that other officers with temporary disabilities from broken bones to pregnancy have been given light duty assignments within the structure of the Police Department. Many of these positions do not involve the handling of a gun or any tasks which may be dangers to other officers or civilians. Contrary to the City's assertions, the Union argues that the assignment of the grievants are not permanent but are temporary. The grievants remain subject to the determination of the decision makers once a hearing is conducted. This however, does not preclude the City from complying with the reinstatement order and placing them within the Police Department.

In addition, the Union maintains that the city's actions are not only contrary to the Agreement, but also set a bad precedent. If the city is permitted to make such assignments, they may assign officers to any positions within the City. The Streets Department for example. Therefore,

the Union requests that the grievance be sustained and the City ordered to reassign the grievants to positions within the Police Department.

The City, on the other hand, maintains that they initially terminated the grievants believing that they were unfit to perform the essential functions of a police officer. The evidence presented indicated that the grievants posed a threat of substantial harm to the public and other officers. The City asserts that they could not be placed within the Police Department as officers knowing that there was a threat of harm. The city had an obligation to keep them off the street until a board can determine their capacity to serve. Therefore management decided to put them in a low level position to direct citizens.

According to the city, such an action is permitted by the management rights clause of the Collective Bargaining Agreement. This assignment is distinguishable from other light duty assignments used within the department. The other assignments are clearly temporary assignments within the intent of the City's policies. These particular placements are not. Moreover, given the City's concerns and the parameters of the Agreement, the assignments were reasonable. The City requests that the grievance be denied.

I have reviewed all of the evidence presented including the notes of testimony, arguments, and the documents provided. The Collective Bargaining Agreement gives the City extensive latitude in the assignment of police officers. The City may not, however, assign individuals outside of the agreed to scope of the Agreement relationship as defined in the Agreement's recognition clause. The Recognition Clause in this Agreement does not define the bargaining unit, for Collective Bargaining purposes, by position. However, the contract provides that the unit is comprised of "all eligible employees in the Police Department except civilian employees, ..." This language indicates that, even though there is substantial latitude in the right to assign, the placement is only covered by those positions within the Police Department.

The evidence presented by the Union is convincing to the extent that it established that prior to the assignment of the grievants, the individuals controlling the City Hall Information Desk were not supervised or otherwise under the control of the Police Department. Until January 27, 1996 the grievants reported to Jenny Lilly, Assistant Manager, Human Resources. After that date, they took their "assignment" from the Captain Combs. However, their working conditions remained the same. In addition, the evidence established that with the exception of the assignment of the grievants, the operation of the control desk has been left to volunteers.

Indeed, the evidence indicates that if or when the grievants are removed from the Information Desk, control will be assigned to volunteers. One can only conclude therefore, that the Information Desk assignment is not considered to be work performed by police officers and under the traditional direction and control of the Police Department.

The evidence presented by the Union was also convincing to the extent that it established that the Department had previously assigned injured or otherwise disabled individuals to light duty assignments within the Police Department. The City argues that these assignments were distinguishable because they were clearly temporary. Management knew when the assignment would end. I disagree with this argument. The evidence clearly showed that the assignment was only effective until the grievants could receive as suitability hearing. Once the hearing is held, the grievants may be either cleared for full service or held incapable of serving as police officers. If the board finds the latter and, since the light duty assignment is not permanent, the grievants may be terminated. Yet for the purposes of the current controversy, the assignment is temporary.

I also find that the evidence supports that there are positions within the Police Department which do not require the carrying of a gun, the operation of a vehicle, or the following of command instructions in hazardous situations. Indeed, the evidence indicates that officers have been placed in areas involving the processing or maintenance of or records which do not involve the handling of firearms nor any contact with civilians.

The basis of this controversy concerns whether, given these evidentiary findings, this Agreement permits the City to make such an assignment. Even though the Agreement does not define the bargaining unit according to specific assignments, the recognition clause implies that the group of individuals represented by the Union have a community of

interest based on a similarity of assignments and working conditions. This similarity has been collectively defined as police work. Specifically, this community consists of personnel involved in work which furthers the mission of law enforcement within City of Allentown.

It is clear that the assignment to the information desk is not within that community of interest. Even though the grievants have kept the same wages and benefits as police officers and report to a ranking officer, there position in not within the mission of the Police Department. Not only is this contrary to the spirit of the Collective Bargaining Agreement as set forth in the Recognition Clause.

Accordingly, I must find that the assignment of the grievants are violative of the Collective Bargaining Agreement.. The grievants shall be reassigned to positions within the Police Department which are consistent with their restrictions.

AWARD

The grievance is sustained. The City violated the Collective Bargaining Agreement when it assigned the grievants to a light duty assignment at the City Hall Information Desk. The City is ordered to reassign the grievants to positions within the Police Department which are in compliance with their restrictions.

Dated: Monday, September 16, 1996

_____

Alan A. Symonette, Impartial Arbitrator

I. Factual Background

Plaintiff James Balliett was an officer of the Allentown Police Department from August, 1984, until August, 1990, when he was terminated by the Allentown Chief of Police at the time, Wayne T. Stephens.

In April, 1990, plaintiff had been placed on sick leave by Chief Stephens pending counseling and a psychological evaluation of plaintiff's fitness for duty as a police officer. The ultimate decision to terminate plaintiff's employment was based upon the report of Dr. George M. Perovich, who concluded that, "Mr. Balliett does not want, nor is he suited to be a policeman." (1994 WL 719637 at 2).

Subsequently, counsel for the Fraternal Order of Police (FOP) notified Watson Skinner, president of the Allentown City Council, that he was representing plaintiff and requested that plaintiff be given a hearing before the Allentown City Council pursuant to §4408 of the Third Class City Code, (53 Pa. Cons. Stat. Ann §39408). When Council refused to conduct such a hearing, plaintiff commenced a mandamus action in the Court of Common Pleas of Lehigh County against defendants who were then serving as Allentown police and municipal officials.

Although the court sustained defendants' preliminary objections and dismissed the mandamus action, the court noted that plaintiff would be permitted to file a grievance nunc pro tunc pursuant to the collective bargaining agreement between the City of Allentown and the Fraternal Order of Police, Queen City Lodge No. 10.

(Page 3 of Order and Memorandum of 9/22/97 per Troutman, S.J. Docket No. 95-CV-7182)

Complaint, 95-CV-5184, Doc. #9, ¶29). The hearing could not be completed, however, due to a ruling by the Pennsylvania Labor Relations Board that the City is required to negotiate with the FOP over the effect of such a hearing. (Id.)

On August 4, 1995, for reasons not disclosed by the record, plaintiff was ordered to report to the information desk in the Allentown City Hall for an interim light duty assignment pending completion of his termination hearing before the Police Civil Service Board. (See, Exh. C, E, F to Plaintiff's Affidavit in Opposition to Defendants' Motion for Summary Judgment, Doc. #22). Since the FOP took the position that plaintiff's assignment to duties outside of the Police Department was a contract violation, the FOP pursued a grievance under the collective bargaining agreement between the City of Allentown and the union, which was sustained. (See, Exh. G to Plaintiff's Second Motion for Preliminary Injunction, doc. #27). In accordance with the arbitration award, defendants were ordered to assign plaintiff to a light duty position within the police department. (Id.).

Significantly, however, neither the arbitration award nor the grievance from which it arose challenged or in any way altered defendants' position that plaintiff is psychologically unfit to serve as a police officer. Thus, the arbitrator specifically found that,

> [T]here are positions with the Police Department which do not require the carrying of a gun, the operation of a vehicle, or the following of command instructions in hazardous situations. Indeed, the

(Page 5 of Order and Memorandum of 9/22/97 per Troutman, S.J. Docket No. 95-CV-7182)

Officer Balliet to see Dr. Perovich. Feeling some job and home related stress at the time, Officer Balliet agreed to see Dr. Provich, although Officer Balliet testified that he himself had not suggested to anyone that he needed counseling or psychological assistance.

In April, 1990, Officer Balliet visited with Dr. Perovich and discussed general things with which he was unhappy. One half hour into the session, Dr. Perovich indicated that Officer Balliet was depressed and suggested that he take a week off work. Officer Balliet agreed he could use a week off work, but was of the understanding that he would only be taking one week off. Cr. Perovich then asked if he could call Officer Balliet's superior officer downtown to make arrangements for his week off, which Officer Balliet allowed. At this time, Officer Balliet was under the impression that his meeting with Dr. Perovich was part of the Department's Employee Assistance Program and that all of their discussions would remain confidential.

After his meeting with Dr. Perovich, Officer Balliet returned home. Later that night, Lt. Manescu and Officer Balliet's brother, then Sergeant Carl Balliet of the – Department, arrived at Officer Balliet's home and confiscated all of his weapons. Officer Balliet was surprised by this action but remained fully cooperative. Officer Balliet was surprised by this action but remained fully cooperative. Officer Balliet's personal firearms were returned to him the following day, but the Department retained possession of his service revolver.

Following his week off from work, Officer Balliet called Lt. ...

(Page 8 of American Arbitration Award 11/19/92)

AWARD

The grievance is sustained in part in that the grievant is to be reinstated in accordance with the terms set forth in the last paragraph of the Opinion. It is denied in part in that no award of back pay or benefits is awarded to the grievant.

Thomas J. DiLauro
Arbitrator

Dec. 19, 1992

(Page 22 of American Arbitration Award 11/19/92).

City of Allentown

April 22, 1994

HAND DELIVERED

Mr. James R. Balliet
319 North Fulton Street
Allentown, Pennsylvania 18102

RE: City of Allentown vs. Fraternal Order of Police, Queen City Lodge No. 10
No. 93-E-0006

Dear Mr. Balliet:

Please be advised that the City of Allentown has decided not to appeal the decision rendered by the Honorable Thomas A. Wallitsch in the above-captioned matter.

In accordance with the December 19, 1992 Arbitration Award, as affirmed by the Lehigh County Court of Common Pleas, the City of Allentown is reinstating you in your position as patrolman with the City of Allentown Police Department effective Saturday, April 23, 1994. You will be placed back on the City payroll at that time. Immediately upon reinstatement, you will be suspended, with pay, until a hearing, pursuant to the Local Agency Law, can be held before the Police Civil Service Board to determine your fitness for continued service as an Allentown police officer.

It is the belief of the Allentown Police Department that your presence on the force poses a direct threat of

substantial harm to the health and safety of the general public and for this reason the department will seek the termination of your employment as an Allentown police officer. This belief is supported by a comprehensive report, prepared by George M. Perovich, Ed.D., and is based upon the results of clinical interviews and psychological sessions conducted and tests administered between November, 1989 and May 1990. Dr. Perovich in his August 27, 1990 report clearly establishes your inability to safely perform the essential job functions of an Allentown police officer. Dr. Perovich concludes his report by stating his firm belief that "Mr. Balliet does not want, nor is he suited, to be a policeman. His character style is one that does not lend itself to chain and command authority situations. If Mr. Balliet stays on the police force it is reasonable to expect him to continue to disregard established rules and policies when .....

(Page 1 of letter of 4/2294 from Stefanik to Balliet).

pendant jurisdiction with respect to the state law claims.

It is the Defendants' contention that this court lacks jurisdiction over this controversy under the theory of res judicata, collateral estoppel, mootness, failure to exhaust state remedies.

II. STATEMENT OF FACTS

This claim arises from the dismissal of Patrolman James Balliet, hereinafter referred to as Plaintiff or Balliet, from the Allentown Police Department on or about August 27, 1990. Officer Balliet was discharged primarily as a result of psychological evaluations by Dr. George Perovich which found Balliet to have a psychopathic personality, to suffer from an inability to respect authority, depression, rage and an occasional desire to kill other people. As a result of these findings, Chief of Police Wayne Stephens determined that for the safety of Balliet's fellow officers and for the protection of the community, Balliet should be relieved of his duties.

In April 1990, based upon Dr. Perovich's report, Balliet was placed on sick leave (inactive status) with full pay by Chief Stephens, pending further department ordered psychological evaluations.

Meanwhile, city officials offered Plaintiff alternative employment with the city, which he refused. Thereafter, the officials suggested to Plaintiff that he apply for a disability pension, also which he refused.

Left with no alternative, Chief Stephens advised Balliet in a letter dated August 27, 1990, that he was terminated from the police department effective immediately, based upon the findings of Dr. Perovich that Balliet was likely to continue disregarding rules and authority and the he could endanger his life or the lives of other persons.

Chief Stephens' letter to Plaintiff was based upon a legal opinion by the City Solicitor's office, that a hearing pursuant to 53 Pa.S.C.A. §39408 was not required. Legal counsel had advised Chief Stephens that Plaintiff could

pursue his termination through the grievance procedure of the collective bargaining agreement.

On or about October 19, 1990, counsel for the Fraternal Order of Police, filed an action in Mandamus on behalf of Plaintiff in the Court of Common Pleas of Lehigh County, docket number 90-E-128.

The focus of the state court action was Plaintiff's request that the court require Allentown City Council to hold a hearing on the decision of the Chief of Police to terminate Balliet pursuant to the Third Class City Code, 53 P.S. §39408. Section 39408 mandates that city council hold hearings on matters where an civil service employee is suspended "by the director of a department for misconduct or violation of any law, ordinance or department regulation."

Defendants filed Preliminary Objections to the action I Mandamus arguing that §39408 is inapplicable to cases when a police officer is terminated for medical, psychological or non-disciplinary reasons. In addition, Defendants argued that the ...

(Pages 2 and 3 of Defendant's Pre-Trial Memorandum)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES R. BALLIET, Plaintiff	:	NO. 92-4713
vs.	:	CIVIL ACTION
CITY OF ALLENTOWN, JOSEPH S. DADDONA, THE CITY COUNCIL OF CITY OF ALLENTOWN, WATSON SKINNER, EMMA D. TROPIANO, DENNIS J. CRAMSEY, PETER B. FALESKI, BEN S. HOWELLS, JR., FRANK J. PALENCAR, and ERNEST B. TOTH, and WAYNE T. STEPHENS Defendants	:	JUDGE TROUTMAN

DEFENDANTS' MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT AND
IN SUPPORT OF DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT PURSUANT TO RULE 56

I. STATEMENT OF FACTS

This claim arises from the dismissal of Patrolman James Balliet, hereinafter referred to as Plaintiff, from the Allentown Police Department on or about August 27, 1990. Plaintiff was discharged primarily as a result of psychological evaluations by Dr. George Perovich which found Plaintiff to have a psychopathic personality, to suffer from an inability to

respect authority, depression, rage and an occasional desire to kill other people.

As a result of these findings, Chief of Police Wayne T.

...

(Page 1 of Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Partial Summary Judgment and in Support of Defendants' Motion for Summary Judgment Pursuant to Rule 56)

of said law provides that the City of Allentown follow the Third Class City Code in matters relating to civil service (53 P.S. Section 39401, et seq.) Said code clearly states in Section 39408:

> All employees subject to civil service shall be subject to suspension by the director of the department for misconduct, or violation of any law of this Commonwealth, any ordinance of the city, or regulation of the department, pending action by the city council upon the charges made against any of such employees.
> (underlining supplied)

It is clear from the law that only in cases of misconduct or violation of any law of this Commonwealth, any city ordinance or department regulation is an employee entitled to a hearing before City Council. Plaintiff, James R. Balliet, was not relieved of his duties because of misconduct or any violation of law or regulation. Plaintiff's termination was based upon the results of a psychological evaluation performed by Dr. George M. Perovich, attached hereto as Exhibit A and incorporated herein by reference. This evaluation found that Plaintiff, James R. Balliet, is psychologically unfit to serve as a police officer and that he poses a danger to himself and to the general public while acting in said capacity.

Since Plaintiff, James R. Balliet, was not terminated for...

(Page 5 of City of Allentown's Brief In Support of Preliminary Objections)

out his job.

10. Officer Balliet told me that he could not handle the stress of the job and that he no longer wanted to be a police officer.

11. On or about April 13, 1990, without my knowledge or approval, but under my authority, Balliet was placed on inactive status as a result of Dr. Perovich's concerns regarding Balliet's suitability to be a police officer.

12. After Balliet was placed on inactive status as a result of his psychological disability, the city offered him alternative employment, which he refused.

13. I also encouraged Balliet to apply for a disability pension, which he refused.

14. Balliet demanded that he be returned to active duty with a inside position in which he would not be armed or perform police duties on the street.

15. I advised Balliet that no such positions were available, and that he had to be able to fully perform all requirements as a police officer.

16. After Balliet continued to demand to be returned to active duty, I consulted with my subordinates and the City Solicitor's office, and after the consultation, I signed a letter prepared by the solicitor's office advising Balliet that he was terminated.

17. In a letter dated August 27, 1990, I advised officer James R. Balliet, that he was terminated from the Allentown Police Force effective immediately.

18. Based upon the findings of Dr. Perovich, Officer Balliet was likely to continue disregarding rules and authority and that he could endanger his life or someone else's.

19. I did not have any conversations with Dr. Perovich or discuss with him anything about terminating officer Balliet from the police department.

20. I do not recall ever seeing a psychological evaluation of Balliet prepared by any other psychologist which was contrary to the report issued by Dr. Perovich.

21. I am not a personal friend of Dr. Perovich.

22. I am not, and never have been a patient of Dr. Perovich.

23. I did not participate in the investigation regarding the Hornstein matter, nor did I have any conversations with Dr. Perovich regarding the matter.

(Page 2 of the Affidavit of Wayne T. Stephens)

IV. Summary of Respondent's position with each defense identified with regard to each specific act of harm or issue alleged.

The Respondent's defense for the failure to accommodate the Complainant is that the City made offers to the Complainant of an inside job working for the City and a disability pension, both of which were rejected.
(D-1, pg 3)

The Respondent's defense for the notification of discharge of the Complainant is that the Complainant was notified of their intent to pursue discharge owing to the Complainant's psychological disability and the likelihood that he will lose emotional control in difficult situations, no reasonable accommodation could be made for the Complainant as a Police Officer. The Complainant's condition poses a direct threat of substantial harm to his own health and safety, to the health and safety of his fellow officers and to the public at large.
(D-1, pg3)

VI. Facts found during investigation with regard to:

Act of Harm: Failure to Accommodate
April 22, 1994

Protected Class(es): H/D - Perceived
Psychological Problems

A. Establishing/Failing to Establish a Prima Facie Case:

1. Complainant is within the class of persons protected by the PHRA, as defined by

the Handicap Disability regulations. Fact numbers 1 and 2 show this.

2. Complainant requested an accommodation for the Handicap/Disability. Fact number 1a shows this element was not established.

3. The Respondent refused to grant the requested accommodation Fact number 1b shows this element was not established.

4. Respondent could have made reasonable accommodations without undue hardship. Fact number 1b shows this.

B. Identifying each Respondent defense:

C. Showing of pretext/not showing pretext:

FACTS RELATING TO ELEMENTS NEEDED TO ESTABLISH PROBABLE CAUSE: Verified

1. The Complainant is a member of the protected class – H/D – perceived psychological problems.

(Page 2 of the Case Analysis and Finding which was attached to PHRC letter dated 2/8/95)

pending negotiations with the F.O.P. regarding the effect of a non-disciplinary termination. Since Mr. Balliet is currently being paid a salary by the taxpayers of the City of Allentown, we believe those taxpayers should be receiving some services for those monies regardless of our differences.

Mr. Balliet's temporary assignment, pending the completion of his due process hearing before the Police Civil Service Board, will involve the manning of an information desk on the ground floor of City Hall. He will be expected to direct visitors to their destinations, to answer general questions and to monitor persons entering and leaving the building. Mr. Balliet is not being returned to work as a police officer nor will he be issued an official police identification, an official po9lice badge or a weapon. Mr. Balliet will not perform the duties of a police officer. At the direction of the Police Chief, he will be assigned to work under the supervision and direction of Jenny Lilly, Assistant Bureau Manager, Bureau of Human Resources. Mrs. Lilly is responsible for assigning volunteers to the Information Desk, for training these individuals and for supervising their activities. Mr. Balliet will report to Mrs. Lilly during the period of his temporary assignment in the lobby area. Mrs. Lilly will train Mr. Balliet in the performance of his assignment and supervise his activities.

For the sake of clarification, the City's position is as follows:

1. James Balliet is not being returned to duty as an Allentown police officer.

2. Every individual employed as an Allentown police officer must be able to perform all of the essential functions of that job.

3. There are no permanent light duty positions in the Allentown Police Department.

4. The City of Allentown is not creating any permanent light duty positions in the Allentown Police Department.

5. The City believes that James Balliet's continued employment as an Allentown police officer poses a direct threat of substantial harm to his own health and safety and to the health and safety of his fellow officers and to the public at large.

6. The City intends to proceed with the non-disciplinary termination hearing before the Police Civil Service Board following completion of negotiations on the effects of a non-disciplinary termination.

7. James Balliet will be working in a temporary light duty assignment under the supervision of Jenny Lilly, Assistant Bureau Manager, Bureau of .....

(Page 2 of letter of City of Allentown to Richard J. Orloski, Esq.)

A. Yeah.

Q. Okay.
A. I'm sure I read it.
Q. There's a photograph there?
A. Um-hm.
Q. Okay.

MR. ASHLEY: With a yes, Chief?

A. Yes.

MR. ASHLEY: That's a photograph.

Q. And the photograph is of James Balliet and ---
A. Susan Pavonarius.
Q. And the article says that – that they were on suspension more than a year because of claimed mental and physical disabilities, were ordered back to work. Do you see that? You see that that's the lead paragraph of the article?
A. Yes.
Q. And is that article – is that accurate, that they were on suspension because of – of – of – let me see what it says – mental and physical disabilities? Is that why they were on suspension?
A. Yes.
Q. Now, who – who – which – who was on suspension for mental disabilities?

A. James Balliet.

Q. And who was on suspension for a physical disability?

A. Susan Pavonarius Molnar.

Q. And is – and that suspension that they were on, that's your letter of – of –

MR. ASHLEY: Well, I'm going to object to that as far as Mr. Balliet's concerned. Not both of them are in that letter.

Q. -- April 22th – okay.

As of – in this, the – the mental disability that you're referring to that's – that's for James Balliet, that's your letter of April 22, 1994 –

MR. ASHLEY: I'm going to object.

Q. -- placing Mr. Balliet on suspension. Correct?

MR. ASHLEY: Object to that characterization. The words in the article are not the chief's. You've characterized that as a mental – his letter speaks for itself.

Q. Well, Chief –

MR. ORLOSKI: I asked the chief.

MR. ASHLEY: You asked him if that's the – what the letter said and what the ...

Page 30 of Deposition of John Stefanik

A. -- if I – if I knew for certain that that was the problem only.

Q. Some people have a mental problem about mail. They – they have to – they have to get the mail and they have to read the mail as soon as it comes in. You ever hear of that kind of problem?

A. No.

Q. Let me see what kind of mental problems you're aware of. Some people have a mental problem with food. They eat too much. You've heard of that?

A. I – never as a mental problem.

Q. So – so you seem to have the perception of some type of mental problem that interferes with his ability to use his weapon. Correct?

A. That's correct.

Q. What – what – what's what about James Balliet's mental problems make you think he shouldn't have access to a weapon?

A. Again, I don't know directly exactly what it is. There is a problem and that's what I was working on.

Q. But nobody ever told you how his mental problem equated with not using a gun?

A. That may have been discussed.

Page 60 of Deposition of John Stefanik